Law without Sanctions

Order in Primitive Societies and the World Community

by Michael Barkun

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to my parents

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M. B.

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1. Method and Direction in the Study of Legal Phenomena

In a parable embedded in Kafka's *The Trial,* a man from the country seeks admittance to the Law. Before the door to the Law stands a fierce and implacable doorkeeper, and the man from the country, despite ingenuity and patience, never penetrates the doorkeeper's defenses. But even had he done so, it would have been to no avail, for the doorkeeper had informed him that behind the first door were others even more resistant.[1]

Indeed, law has always appeared as one of society's mysteries, hedged about with taboos and frequently cloaked from public view, but the development of mysteries is part and parcel of the process of professionalization. Substance and procedure may vary, but the arcane nature of the law is never wholly dissipated. Then, too, the origins of the law seem to lie so far back in time as to be beyond our ability to recall them. For every code and court there are prior codes and courts, in apparently infinite regress. The search for origins, for some Ur-law, comes up against the ever dwindling and increasingly ambiguous data of the past.

If we cannot readily pursue beginnings, it is nevertheless true that we occasionally become aware of the growth processes of the law, even in a common law system of change by increments. These processes sometimes, under the pressure of events, accelerate above their usual leisurely pace. Francis Biddle, recounting his participation on the Nuremberg War Crimes Tribunal, observes that during that time he knew how judges must have felt in the formative period of the English common law, for he found himself creating the law almost *ex nihilo*.[2] The law as it stretches back through time, can be a phenomenon of awesome continuity, but the constant shifting of social relationships often makes the continuity more apparent than real. The social relationships toward which a legal system is directed may long since have passed into history. There is hardly a legal system in existence that does not have some outrageous anachronisms. What is often lost sight of is the fact that not simply individual norms but entire systems may be geared to the past. Law and society must mesh if law is not to lapse into irrelevance.

We may speak about law and social change, or about the continuity of law, but at some point we must pause and trace the concept "law" to ref-

1. In Franz Kafka, *Parables and Paradoxes* (New York, Schocken, 1961), pp. 61 ff.

2. *In Brief Authority* (Garden City, N.Y., Doubleday, 1962), pp. 369–487.

erence points in the observable world. The antiquity of law notwithstanding, the term has embraced some very different modes of behavior, and the search for common qualities behind these manifestations has proved an elusive and difficult undertaking. "Law" and "the legal system" float in a conceptual limbo. Much ink has been spilled seeking answers but the question has frequently been an unanswerable question of essence: "What *is* law?" It may *not* be a "brooding omnipresence," in Holmes' derisive phrase, but negations tell us little. Law must ultimately be tied to the ways in which people behave.

Any study of law as a social phenomenon bears its own distinct methodological burden. The legal systems with which we are most familiar—those anchored in the common law tradition—have over the years developed convenient methods of their own. So, too, have the civil law systems of continental Europe. It is easy to fall victim to the temptation and to appropriate these venerable techniques. Methods, however, are dictated by considerations of ends, and legal methods have been governed by legal and societal ends. In other words, despite the differential development of law in the Anglo-American and continental European areas, method has remained in both cases subservient to the demands of the legal profession. Lawyers and judges do what is necessary to preserve their professional domain and to settle the problems society sets before them.

If, for the moment, we lump all legal methodologies together, we will see that they stand in fundamental opposition to the viewpoint of the social sciences. Science accepts the necessity and desirability of a distinction between statements of fact and statements of value. This may be, it is true, a counsel of perfection. As Bronowski points out, the scientific endeavor generates its own values.[3] Exceptions notwithstanding, social scientists attempt to expunge value judgments where possible, to make biases clear, and to live with the anguish that a residue of valuation remains. The framework offered by American trial procedure has often brought such potential methodological conflicts into actuality. The premise that the clash of equally matched advocates is the best possible means for arriving at "truth" underlies the adversary process. Science, advancing by intersubjective testability rather than by sublimated combat, has not proved a welcome guest in the courtroom.[4] In any event, even if "truth" is the value to

3. Jacob Bronowski, *Science and Human Values* (New York, Harper, 1956), pp. 65–94.

4. Some dimensions of the evidentiary problem appear in Edwin M. Schur, "Scientific Method and Criminal Trial Decision," *Social Research, 25* (1958),

be achieved in both law and science, it is given different functions in each. For the legal system, "truth" serves society by reducing the level of conflict and increasing the appearance of harmony. In science, "truth" is valued insofar as it explains and predicts and eventually leads to other "truths" at higher levels of abstraction.

Because of this divergence in methods, questions that are formulated as legal questions cannot easily be dealt with in a social-scientific framework unless they are reformulated. The traditional jurisprudential question, "What is law?" falls into this category. To be answered in its own terms, it requires a plunge into "the illusion of real essence." [5] We must, in other words, be prepared to find the entity "out there" called Law. Such an approach, although congenial to many philosophers, sounds suspiciously like reification to social scientists. For the latters' requirements, "law" must be taken as a label of analytic convenience rather than as an immutable abstraction. Along with this question, other classic jurisprudential queries must be radically reformulated, or abandoned altogether, if we are to reach any kind of systematic empirical understanding of the social role of law. Such issues as the nature of legal obligation, the relationship between law and justice, and the relationship between law and morality arose from a nonscientific milieu with a nonscientific methodology. Social scientists who seek direct access to these issues do so at their peril.

Although jurisprudence has traditionally been defined as "the science of law," it has always been fairly well insulated against incursions of the scientific method. The independent development of disciplines, often through separate institutions and faculties, has—at least in the Anglo-American world—maintained this insulation, until quite recently.[6] With some notable modern exceptions, the institutions of legal education have been geared to the production of competent professionals, and only secondarily to research as research. The theoretical apparatus of the legal professional has involved logical manipulations of a legal corpus more often than the empirical study of patterns of human behavior.

173–90; and Jack B. Weinstein, "The Law's Attempt to Obtain Useful Testimony," *Journal of Social Issues, 13* (1957), 6–11.

5. T. D. Weldon, *The Vocabulary of Politics* (Baltimore, Penguin, 1955), pp. 2–30.

6. In continental Europe, on the other hand, law and the social sciences (to the extent that the latter have developed) have frequently been housed in the same faculty; see Michel Villey, "Law and Values—A French View," *Catholic University of America Law Review, 14* (1965), 158–70.

This being so, a social-scientific treatment of law and legal problems requires a methodology that is tailored to its requirements. This is a mixed blessing, for what it secures in distance, freshness, and systematization it risks in the proliferation of needless new terminology. Lawyers who are anxious to apply a social-scientific outlook often fail to take advantage of valuable categories that already are at work in other fields. They construct not only a new methodology but re-invent much that should have been borrowed.[7]

This may be a good time to make clear the debt the succeeding chapters owe to a whole range of contributing disciplines. Scholarly disciplines dance their own strange minuets, separating and fusing over different generations. Our own generation is generally acknowledged as a time of increasing interdisciplinary research, which in itself is a judgment on the received boundary lines, at least within the social sciences and between them and the law. The political scientist often has as much to say to the sociologist as to some of his own colleagues, and legal scholars, liberated from a purely professional environment, find fruitful dialogue with social scientists of all varieties. There is growing recognition that factors that once contributed to a necessary insulation of research now conspire to produce isolation. Departments and colleges may form convenient units for administrators, but they need not bear any relationship to the actual patterns of scholarly activity.

The law, as it happens, is a prime example of the fruit born of interdisciplinary cooperation. Lines of inquiry in political science, in sociology, in social anthropology, and in legal studies have converged. Derek J. de Solla Price remarks that one of the key units in any science is "the invisible college," [8] or individuals working along similar lines who have come to know and build upon one another's work. The glut of printed material that currently afflicts all disciplines makes it difficult to maintain clear channels of communication, and the result has been the slow construction of these informal groupings. The web of conferences, correspondence, and personal meetings produces patterns of interchange that may, over time, assert themselves in visible institutional forms, eventually to generate the

7. An example is Karl N. Llewellyn, "Law and Social Sciences—Especially Sociology," *Harvard Law Review, 62* (1949), 1286–1305.

8. *Little Science, Big Science* (New York, Columbia University Press, 1965), Chap. 3.

same informal groups within themselves as administrative boundaries come to relate less and less to the interests of researchers.

The social-scientific study of law is beginning to leave the "invisible college" stage. The fact that we can read in the literature of a "whispered consensus" among social scientists and lawyers [9] offers a kind of benchmark. The consensus grows out of multiple causes. In the first place, they often took their data from similar sources. Sociologists and political scientists examined the courts, although the former gravitated to trial courts and the latter to appellate courts. Likewise, the legal profession itself began to constitute a research field. The political scientist's former concentration on the analysis of constitutional law doctrines gave way to empirical investigations of the process of judicial decision-making. From the other side, as it were, lawyers saw their own profession and its activities in a new light.

The legal realists, early bridge-builders between social science and law, sought to "demythologize" the law, to strip it of mysteries that were honored even by those who knew that the situation was otherwise. Legal positivism in the nineteenth century had broken with natural law, arguing that law was discovered in the outputs of parliaments and courts, not in the variable and invisible processes of reason alone. A similar and equally revolutionary break with the past took place in the late nineteenth and early twentieth centuries, when, in the writings of Holmes, Cardozo, Jerome Frank, and Karl Llewellyn, lawyers and judges were exhorted to see their work "as it was." There was naïveté and a lack of system in the realists—as in "existentialism," more a mood than a school—but this changed the lawyer's outlook on himself and on his profession. It demonstrated, too, that social science could tell the law useful and interesting things about itself, and, further, that lawyers and judges frequently are working social scientists.

Finally, and most remote of all, social anthropology probed similar subjects in decidedly dissimilar settings. For reasons that to this day are not wholly clear, British social anthropologists and their American disciples evinced deep and continuing interest in the politics and law of the peoples they studied. As long as these tribal units remained powerless and cut off from national and international politics, they were of concern only to the

9. Albert Broderick, O. P., " 'Law-Society' in the Liberal Arts: A Whispered Interdisciplinary Consensus," *Catholic University of America Law Review, 14* (1965), 176–91.

small group that was committed to studying them, but the breakdown of colonialism, the ascendancy of national elites in former colonies, and the consequent commitment to national integration and economic development have served to make impossible a clear-cut separation of "Western" and "non-Western" and "developed" and "underdeveloped" nations. The legal systems of new nations, bequeathed by the former colonial powers, now reel under the collision of multiple legal systems: those of the former metropolitan powers and the indigenous systems that had been effectively suppressed.

These considerations by no means exhaust the factors that are working toward a community of scholarly interest.[10] The community now exists, and with it goes the shared intuition that the sociology of law, the anthropology of law, the political science study of constitutional, international, and administrative law, and the activities in the law schools themselves point toward a common center. This is, however, a case of intuition outstripping theory. The invisible college—it has not even a field name, although some propose "law-society" [11]—senses common purpose. At the level of particular research projects, it is often difficult to tell the disciplinary affiliation of the author, for this, in the literal sense, has become nominal. But the sensed unity has not been made explicit. The theoretical framework for intellectual unity has not appeared.

Time and resources have necessarily been put to other tasks: to securing various levels of acquaintance with the languages and practices of previously alien fields and to opening up and exploiting hitherto ignored sources of data. Political scientists, who concentrated on the Supreme Court to the exclusion of all other tribunals, now probe the once neglected local and state courts. Anthropologists and sociologists, with a wealth of ethnographic materials before them, can now settle down to the prodigious task of cross-cultural comparison through such data repositories as the Human Relations Area Files.

In sum, then, there is no dearth of research activity, even though its

10. Current interdisciplinary trends have been chronicled in a number of journal articles, most notably by W. G. Friedman, "Sociology of Law," *Current Sociology, 10–11* (1961–62), 1–16; Glendon Schubert, "Behavioral Research in Public Law," *American Political Science Review, 57* (1963), 433–45; and Jerome H. Skolnick, "The Sociology of Law in America: Overview and Trends," *Law and Society* (a supplement to *Social Problems,* Summer 1965), pp. 4–39.

11. Broderick, " 'Law-Society' in the Liberal Arts."

theoretical relevance is by no means always clear. This is certainly not a catastrophic state of affairs, and certainly not one without precedence, but for the fact that, ultimately, there cannot be research without theory. All of us are theory-builders and theory-users, even as Molière's benighted M. Jourdain was a consumer and producer of prose. Inasmuch as all of us have truck with theory, why except those who investigate the relationships between law and society? The politician has his implicit theory of how a bill is passed or how he can change voters' minds; even if he never articulates this, its definitions and conceptual relationships guide his tactical and strategic decisions. And we could go down the list of more prosaic callings endlessly. If this is the case, it should also apply to social scientists who are committed to the construction of theory. Theory abhors a vacuum, and we may take it as a rule of thumb that even the most circumscribed investigation into a municipal court or an East African tribe implies a general theory of law.

Of course, as far as social science is concerned, such a theory does not yet exist, but assuredly it exists in law. Legal scholars have been great and potent theory-builders, but, of their varied and elegant efforts, one in particular has achieved a high measure of acceptance, which for convenience we call the "command theory." Its preeminence in jurisprudence has been such that no jurisprudential writer who seeks to challenge it does so without attempting a thoroughgoing demolition job.[12] It is possible to trace this theory to Thomas Hobbes, but it can more fittingly be identified with a later and less well known English theorist, John Austin (1790–1859).[13] Although possessed of one of the most tedious styles ever to see print, Austin carried his argument forward with implacable logic, which, as it happened, persuaded succeeding generations as well. Austin's theory, embodied in his own works and in those of his intellectual heirs, is of more than parochial significance. It has swayed social scientists as well as lawyers. At the moment, it constitutes the implicit jurisprudence that orders much of the social-scientific inquiry into the legal system.

In Austin's famous phrase, law is "the command of the sovereign."

12. See H. L. A. Hart, *The Concept of Law* (London, Oxford University Press, 1961), Chaps. 1–4.

13. See John Austin, *Lectures on Jurisprudence, or, The Philosophy of Positive Law* (4th ed. London, John Murray, 1873). Austin's fundamental ideas can be garnered from almost any of his writings.

Rules of conduct can properly be called laws only when force or the threat of force stands behind them. The coercive power of the state, exercised or brandished, makes the difference between the pious hopes of morality and the grim certitudes of law. Thus the Austinians. This position, simplified though it is, lies at the heart of Austinian theory, and its major implications are twofold.

First, it creates priorities among research aims. There can be no great value in examining the structure of legal rules themselves, for, after all, they share this structure with morality; both are "ought" statements about human behavior. If legal scholars entered the realm of rule structure, they would trespass on the domain of ethics, religion, and poetry, with which the law might be confused, when in fact it is quite distinct. We should, instead, concentrate our study upon the processes of command and enforcement. How does the state bring its power to bear? What sanctions constitute its armament? How can these sanctions be most economically used? How often can threats of force take the place of force?

Second, the command theory involves us in a determination of law and non-law. Absence of a commanding ruler, whether monarch or parliament, clearly makes the rules of morality part of the nonlegal realm (or, more precisely, those rules we think of as morality, which are not incorporated in promulgated positive law). The real rub occurs when inquiry passes from morality to systems of rules, which men call law, without a secular sovereign—most conspicuously, in Austin's time, to international law. In Austin's logical scheme, law without a commanding sovereign was a contradiction in terms. Therefore, international law was not law; it was not positive law but positive morality. Austin's stern judgment haunted international legal theory, but international lawyers—Austin to the contrary notwithstanding—have continued to regard their system of rules as a true legal system. Had ethnography been a mature discipline when Austin wrote, he would have had to lump international law and numerous primitive societies in which anthropologists contended they had found legal systems but no chiefs or kings or councils of elders. In a word, then, Austinian theory created a category of distinctly marginal legal systems. "Law" was a term as widely used as ever; it covered these marginal systems, as well as "law properly so-called," but all this in the face of a rigorously maintained opposing position.

Social scientists, who might have been expected to bridle at the narrowness of this conception and application of law, by and large adopted

it. After all, it had its advantages: it was precise, and capable of being easily translated into the language of empirical observation.[14] Then, too, it permitted comparative work among legal systems. Although it is an open question whether Austin was describing English law or merely creating an ideal type, his view of the legal system was useful wherever the state existed. Also, the command theory neatly complemented the influential view of Max Weber, for whom "legal order" was inconceivable outside the state and for whom "state" meant the monopoly over the legitimate use of physical force in a territory.[15]

The utility of the command theory did not, however, totally obscure the fact that it did not cover, and indeed rejected from consideration, many systems of rules to which the name "law" still attached. Even as late as 1961, the influential British jurisprudential thinker, H. L. A. Hart, felt compelled to observe:

> It is quite obvious why hesitation is felt in these cases. International law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions. Certain types of primitive law, including those out of which some contemporary legal systems have gradually evolved, similarly lack these features, and it is perfectly clear to everyone that it is their deviation in these respects from the standard case which makes their classification [as law] appear questionable. There is no mystery about this.[16]

These, then, are the deviant cases. Although classical theory judges them beyond the pale of law, this judgment has settled nothing. The question remains, and in a sense becomes more pressing with each new international treaty and each new ethnographic report on a remote, primitive society: the evidence mounts that significant groups of people regulate

14. A neo-Austinian definition of law was given by E. Adamson Hoebel, in *The Law of Primitive Man* (Cambridge, Harvard University Press, 1954), p. 28: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."

15. Reinhard Bendix, *Max Weber, An Intellectual Portrait* (Garden City, N.Y., Anchor Books, 1962), pp. 390, 417, 418.

16. Hart, pp. 3–4.

their affairs without meeting Weber's criteria for the existence of a "state." The mere existence of deviant cases throws suspicion upon the theoretical scheme that gave them problematic status in the first place.[17] Frequently, the closer we look at deviant cases, the more arbitrary appears the theory by which they were excluded. For example, if we accept the classical international law idea that the state is the only entity that has legal status, and if we see all around us international organizations that seem important but are different from those of states, our inclination is to revise the theory, not to doubt our vision.

In the pages ahead we will be looking in some detail at these marginal cases, in the hope that their marginality will shed some light on the total field of law. The paradox may be that only by reaching to the marginal and the rejected can we gain a clearer picture of phenomena at the center. In other words, after looking at international and primitive law we may better understand our own legal systems. The juxtaposition of the strange and the familiar has dual effects: it emphasizes the universals that bind them together, and in such a way as to demonstrate facets of the familiar in the exotic and hitherto overlooked aspects of the bizarre in institutions that have been taken for granted.

Finally, we must make some general observations on the grounds on which theories are accepted or rejected. Every theory ought to generate propositions that can be put to the test of observation; however, even if all of the propositions stand, other considerations may lead to the overthrow of the theory from which they were derived. And every theory that is above and beyond criteria of testability must prove itself on other grounds. Necessary though it may be that theoretically generated predictions "fit" the real world, an indefinite number of theories will meet this requirement in any area, far more than science could possibly assimilate. Even when its predictions are falsified, a theory may survive because it can be reworked to explain the deviation. Thus Ptolemaic astronomy maintained itself by the addition of ever more complicated ideas about planetary movement to account for the fact that observations of planets showed that they moved both forward and backward across the sky, in a spiral. Once these adjustments were made, the Ptolemaic system generated predictions about planetary positions that were quite as accurate as those

17. Seymour M. Lipset, *Political Man: The Social Bases of Politics* (Garden City, N.Y., Anchor Books, 1963), pp. 435–36.

derived from Copernican theory,[18] but no one will argue that the scrapping of earth-centered astronomical theory was a mistake.

Theories do more than generate accurate predictions; in some sense they also chart a course for future research.[19] They are open-end systems, pointing toward but not solving additional problems. No theory solves every problem, but a theory that indicates the problems that can be solved and those that cannot is clearly superior to one that contains no signposts for the future. The command theory of law gives evidence of default on two counts. First, it asks a limited and unfruitful series of questions that leads to an understanding of a circumscribed set of sanctions, at the expense of other features of the legal system. Second, it systematically excludes much in man's experience that has borne the name of law.

Theories also are convenient summarizations of the world of empirical phenomena and they must be judged on the extent to which they provide such summarizations. No theory simply pre-exists, awaiting discovery; multiple theories, covering the same phenomena, compete for acceptance, ultimately on grounds other than resistance to testing. Despite the social scientist's general abhorrence of mixtures of fact and value, he has tended to look at stateless societies, both international and primitive, from the received perspective of domestic law. Domestic law is unavoidably a highly visible part of his environment. We have here a kind of unconscious cultural bias in which the theoretical framework of the legal profession, which appears to cover law adequately (as we normally see it), has been unquestioningly imported into social science. But once we accept the premise that theories are constructed and are not discovered in a sphere of Platonic archetypes, there is little to justify this kind of uncritical appropriation.

Law is not simply another discipline to be borrowed when lacunae in one's vocabulary so demand; rather, it is a social science datum. It must, for social scientists, be a datum before it is a professional orientation, a field of humanistic study, or a set of institutions in one's immediate environment.

Science proceeds by successive radical restructurings of empirical reality.[20] To explain and predict phenomena, rather than merely describe

18. Michael Polanyi, "The Metaphysical Reach of Science," unpublished lecture, delivered at Duke University, February 10, 1964.

19. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press, 1962).

20. Ibid.

them, is to increase our span of understanding over the real world by the use of abstractions. Abstractions permit similar treatment of events that in their outward characteristics seem worlds apart. In this endeavor there are limits on the components of the knowledge-gathering process, on resources, on the ability to employ resources, and on the capacity of human beings to assimilate the results. Thus, along with criteria of verification and fruitfulness for subsequent research, there is a standard of parsimony. In a word, the aim of science is to explain and predict the widest range of phenomena with the least expenditure of intellectual effort—to achieve intellectual leverage over experience in which successive constructions of theory produce multiplier effects of ever greater magnitude.

We must ask some questions of a concept of law that is seen in this light. Does it cut across cultures or is it bound to a single arrangement of institutions? Does it encompass rather than exclude present deviant cases? Does it cut across disciplinary lines when we have reason to believe that these lines have become outmoded as research guides? Finally, does it seek its confirmation in observed patterns of behavior?

In like manner, this study poses a series of questions about marginal and central manifestations of law. Are there structural similarities between international society and primitive society? Does conflict increase or decrease as a society becomes more cohesive? What role does consensus play in support of legal norms? How does our perception of our social environment aid us in making choices? What contribution does law make in organizing these perceptions? What is the relationship between law and various types of mediation? In the construction of a concept of law that meets the above criteria, what features will be constant and what features will vary according to the cultural milieu?

The starting point is precisely the deviant cases that are produced by the command theory: international law and the law of primitive societies. A detailed consideration of these cases will serve to direct our attention to general questions of legal function that transcend a particular society or culture. Thus the chapters that follow alternate between the richness of detail that individual law forms exhibit and the concern for general questions that an examination of the particular must always generate. The discussions must, of necessity, proceed simultaneously upon the dual levels of observed behavior in specific settings and the broad motifs that are suggested by these observations.

Much that follows will prove unfamiliar, at least in any law-related con-

text, which is not meant as evidence of its worth, only as forewarning. The burden of proof lies, as always, upon proponents of change rather than upon defenders of ideas of proven utility. It seems to me, however, that the past has been an uncertain guide in this regard, providing us with blinders as often as with telescopes.

One thing further must be said by way of preliminaries: in only the most limited sense do any of the succeeding chapters stand alone. Each is concerned with what went before, even as new elements are added. The result may be only a sand castle, but it produces a perplexing by-product: much of Chapters 2, 3, and 4 seems to have nothing whatever to do with law—indeed, simply tedious exercises in avoiding the subject altogether. The tedium might have been avoided but the irrelevance of the early subject matter is only seeming: it provides an essential foundation for the later, law-centered chapters, and it reappears in clearly legal contexts. This, in large measure, is an attempt to reach law at its roots, before we go on to its more visible and familiar facets, an exercise that is made unfamiliar only because of the curious devices scholarly disciplines have for dividing up their jurisdictions.

2. Two Societal Structures

For the purpose of legal analysis, how can we go about comparing the structures of two such different societies as the segmentary lineage societies of equatorial Africa and international relations? Indeed, is it possible to speak of a "society of nations," no matter how freely this term has been used in the past? The immediate problems concern the distribution of these societies through space and time. As for the first problem, in modern times the international system has for all practical purposes been expanded to global dimensions, although until about the eighteenth century it encompassed something called (with supreme presumption) "the known world." Tribal societies that are characterized by segmentary lineage are distributed across the middle of the African continent, in areas of prime colonial expansion and competition. In what sense, then, have they been part of the larger international society, if we assume for the moment that such a society can be shown to exist?

"The known world" and the Europeanized dominions of the colonial epoch had their backwaters and their unexplored enclaves. Even after the segmentary societies in East and West Africa had been nominally engulfed by European powers, they remained insulated from the ebb and flow of international politics. Physical remoteness and decentralized colonial administration preserved them relatively intact. The ethnographers of these societies, who arrived at virtually the last moment, gave a fair picture of modes of life that were continuous through precolonial and colonial times. Only a relative absence of intertribal wars marked the colonial period.

This limitation, however, is of slight importance for our purposes, because (a) we shall be concentrating upon the processing of *intra*societal conflicts; and (b) in the oral tradition of the tribes, data on the wars remained. The irony is that these societies suffer much more from the native governments of the present day than they suffered from their colonial predecessors. The colonial powers were content to exercise nominal control and to secure the maximum in economic advantage. They had no interest in pursuing national unification; indeed, they had a positive interest in preventing it. The centralizing efforts of the new governments is profoundly antagonistic to the concept of tribal loyalty, and more and more the ethnographers' records reflect a strict limitation, not only in space but in time. Increasingly, they record a world of the past, but these descriptions nevertheless continue to shed a piercing light upon the international relations of our own day. The African materials, then, are bounded in space and in time.

Time also operates in the interactions of nations. Diplomatic history shows that international relations are mercurial affairs, between fickle allies and opportunistic rulers. What is significant, however, is the continuity that can be observed throughout the flux. Structural characteristics often prove to be unusually persistent; in their neutrality they survive the fall of nations. The stubbornly uncentralized nature of the international system in this sense overrides a great many otherwise pivotal political changes. For our purposes, much that historically has been held to be of great account may be submerged beneath a concern for the longevity of basic structural arrangements. Different international political configurations have successively occupied the same geographical areas; different tribal societies have simultaneously occupied separate geographical areas. In both instances, structure emerges as the unifier, drawing together much that on the surface seems unlike.

Methods of inquiry may vary a great deal, but various substantive questions continue to be posed within each method. There is no need to recapitulate the history of social science methodology and acknowledge that political phenomena now are studied in ways vastly different from those of a century ago. Nonetheless, many of the basic questions remain the same, even though today they may be couched in a modern idiom, such as the desire to place every polity at its appropriate place along a continuum that runs from centralization to decentralization. From Aristotle onward, variations in structural arrangements have fascinated political observers. Over the centuries, questions of value and political philosophy have become intertwined with observations. In the empirical component itself, however, there is much that draws together traditional categories and such contemporary variants as "unicentric" and "multicentric" power systems.[1] The line is not wholly straight in this matter, but there is common concern over the distribution of power as a reflection and as a determinant of societal structure.

Just as this continuum occurs in the literature of political science, it also has entered into the thinking of legal scholars. In the past, law was so exclusively related to the state that only this peculiar power distribution (the state) was thought to produce it. Although the pull of this venerable

1. Paul Bohannan, "The Differing Realms of the Law," *Ethnography of Law* (supplement to *American Anthropologist, 67,* 1965), pp. 33–42. In its range and originality, Bohannan's article is a major contribution to modern jurisprudential thought.

idea remains strong, there is an alternative formulation. In an attempt to provide new perspectives on international law, Richard A. Falk has recast the political scientist's dichotomy into "vertical" and "horizontal" legal systems.[2] The former is the familiar state system of the classic legal literature; in political terms, it corresponds to the state (it is, in other words, kin to Austin's conception). A vertical legal system consists of a hierarchy of norms that is paralleled by a hierarchy of institutions that has the wherewithal to compel obedience to its commands. The horizontal legal system is a world apart; its participants are at least formally equal, rather than the occupants of a carefully scaled hierarchy. The implementation of its rules cannot very well depend solely upon force (it is nowhere sufficiently concentrated so that force can be effectively and invariably applied); instead, self-help and self-restraint take the place of the sovereign. Both systems, of course, are pure types, but are more or less approximated in the real world.

Falk's typology, to which we shall again refer, can be better understood if we see that, in the vertical system, each level in the hierarchy can legitimately command all lower levels, and the topmost level may command the entire system. The horizontal organization contains groups that are, for all practical purposes, autonomous, with the caveat that a vague sense of community binds them together in times of general, external threat. These groups, being equal in status, can establish relationships on a noncoercive basis. Although these two types were constructed to make clear the differences within domestic (or, in the terminology of jurisprudence, municipal) law, they also are sufficiently general to serve for the African systems we shall be examining.

In other words, it has been suggested that societies and legal systems can be categorized according to the degree to which power is either centralized or dispersed. Just as there are vertical and horizontal legal systems, societies can be similarly classified, whether the utilized terms are unicentric and multicentric or some other pair. At this point there is no warrant for concluding that unicentric societies have vertical legal systems and multicentric societies have horizontal legal systems. As we examine

2. This dichotomy appears in a number of Falk's writings, but the general conception seems best conveyed in "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," *Temple Law Quarterly, 32* (1959), 295–320; and "The Reality of International Law," *World Politics, 14* (1962), 353–63.

the evidence, however, we find that it is precisely in this direction that it points. The way in which a society is organized has a marked effect on the way order is achieved within it. The parallel dichotomizations in the study of societies and legal systems are not simply fortuitous but, rather, reflect underlying uniformities.

The task of classification is complicated by the necessity for clearly specifying the unit of analysis. International law, for example, is found to be a horizontal legal system, a conclusion that is reached by looking at the interactions of states on the continental or global level. If, however, the object of attention is a smaller unit, such as France or Great Britain, the legal system of this smaller unit is much closer to the vertical. Where the boundaries of analysis are set in large measure determines the conclusions we may legitimately draw. Lowering or raising the size of the unit frequently has the effect of radically altering the structure that presents itself to us. A rigorously hierarchical system may, in the expanded view, turn out to be only one component of a larger system that is quite diffuse in its power arrangements.

An unconscious shift in the unit of analysis—from state to international system, from kinship group to tribe, or vice versa—can markedly alter the nature of the data. We are dealing here with "nested" groups, large units that encompass small units, like so many Chinese boxes. But the Chinese-box analogy has its limitations, for the larger units turn out to be more than mere magnifications of their constituent parts. A society is not a family writ large, although the ideology of autocracy might have us think so. By the same token, international law has been almost hopelessly confused by those who succumbed to the temptation of thinking it is municipal law blown up to global dimensions. The systems are indeed nested, if we are content to say only that large units contain within them smaller ones, and that these comprehend smaller ones still, without requiring that all the units be identical. They may be, but certainly they need not be.

Having gone through these necessary preliminaries, we must now look in detail at the primitive and international systems themselves. The primitive societies to which we shall give the most attention are those that are organized around the principle anthropologists call "segmentary lineage." The term "primitive," as applied to them, unfortunately suggests that they are in some way inferior to "civilized" societies. The fact is that usage within anthropology itself has varied greatly, attempting always to be pre-

cise and to avoid invidious comparisons. Thus such terms as "nonliterate" and "simple societies" have enjoyed vogues. We use the somewhat more archaic term "primitive" only to refer to societies that are studied within the disciplinary confines of classic social anthropology; it is not to be taken as a term of valuation. All that can be said in defense is that "primitive" has been widely used by anthropologists themselves, particularly in legal anthropology, which makes any additional translation of terms unnecessary.

What is a segmentary system? In the very broadest sense it is a social system in which "the principle of subdivison or segmentation is pervasive and basic to its social structure." [3] So construed, segmentation can in effect be separated from lineage, and can be made to include both lineage and nonlineage societies. Indeed, a pluralistic interpretation of American society might well turn out to be quite consistent with such usage. An inclusive concept of segmentary has obvious comparative advantages,[4] but it parts company with the overwhelming weight of usage among anthropologists. In the strictest sense, anthropologists talk only of segmentary *lineage* systems, a particular type of social structure that was found among primitive societies and was classically described by E. E. Evans-Pritchard in his ethnography of the Nuer of the southern Sudan.[5] If we are to utilize the contributions of social anthropology, effectively, we must hew to a definition of segmentary societies that includes the element of organization around particular lines of descent.

It is the rule rather than the exception for considerations of kinship to loom large in fixing the social organization of primitive societies. Lineage, although merely one of many manifestations of familial relationships, plays a prominent role in the disposition of political and legal problems. Segmentary lineage systems are set apart by the complexity and symmetry of the descent scheme and by the relative absence of other means for holding the society together and articulating its units. Kinship considerations receive little attention in our own society, not only because of the manifest simplicity of the family structure but because governmental, reli-

3. M. G. Smith, "On Segmentary Lineage Systems," *Journal of the Royal Anthropological Institute, 86* (1956), 39–80.

4. M. G. Smith, "A Structural Approach to Comparative Politics," in David Easton, ed., *Varieties of Political Theory* (Englewood Cliffs, N.J., Prentice-Hall, 1966).

5. Evans-Pritchard has written more than a dozen studies of the Nuer; the most comprehensive is *The Nuer* (London, Oxford University Press, 1940).

gious, educational, business, and other institutions combine to give additional coherence to American society. We might achieve a more accurate perspective on segmentary lineage if we could imagine the United States held together by familial connections and nothing more.

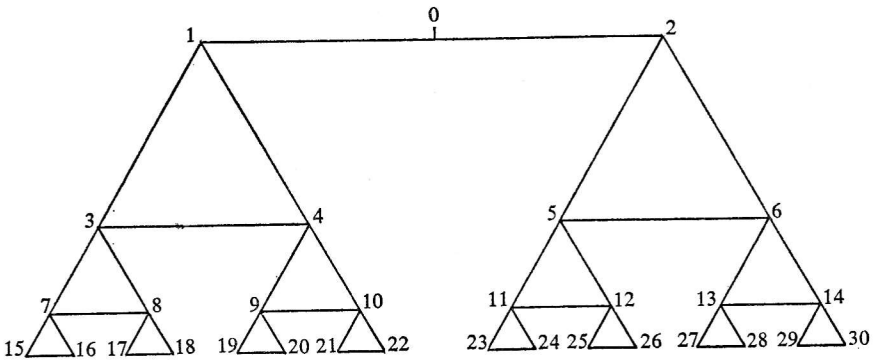
Members of segmentary lineage societies define their society as a system of descent groups; [6] and everyone has his place on a single "genealogical tree." If we were to inquire of an individual about his position on the tree, he would identify his place by naming the relevant ancestor. In principle, of course, genealogical question are factual matters that can be answered definitively. At length we will find that the precise degree of correspondence between a society's accepted descent tree and an objectively determined account of descent often is not very great. This need not detain us here, however, for the important thing is that members of the society accept the genealogy and order their relationships in terms of it. The correlation between societally perceived and objectively determined descent has its legal consequences, which often are quite striking, but for the moment we can accept—more or less at face value—the version of descent a society itself accepts.

It may be interjected at this point that ethnographic accounts of segmentary lineage are only the rationalizations of cultural outsiders and need bear no meaningful relationship to the perceptions of insiders. Does a member of the Nuer really see his society as Evans-Pritchard sees it? The answer, of course, must be no, just as no American of the 1820s saw his society exactly as Alexis de Tocqueville did. No one would deny, however, that De Tocqueville did a very good job of getting inside the American psyche. There is bound to be an element of rationalization in one's descriptions of other societies, stemming both from irreducible cultural differences and the simple commitment to systematic research. As far as the data take us, it appears that ethnographic accounts accurately tell us what participants *believe* to be the case. It need hardly be emphasized that this does not necessarily correspond to what investigation reveals to *be* the case, or, for that matter, to the grounds upon which participants sometimes act. Often we will find that participants' behavior patterns subtly and *unconsciously* modify the idealized image of society that tradition has transmitted.

A verbal description of segmentary societies conveys some of their

6. Lucy Mair, "Some Current Terms in Social Anthropology," *British Journal of Sociology, 14* (1963), 20–29.

major characteristics, but a clearer view emerges when the lines of descent are represented schematically. The diagram is an abstraction of lineage charts of many segmentary lineage systems and preserves intact the crucial characteristics of symmetry and nesting. Each of the numbered points from 1 to 30 represents a lineage segment, that is, a group of persons who share a common ancestor. Segments are supposed to act corporately, behaving as one man in their relationships with other groups. Primitive law has long been known to be weak in concepts of individual responsibility. A law-breaking individual transforms his group into a law-breaking group, for in his dealings with others he never stands alone. Conversely, if he is wronged he may depend upon his kinsmen for vengeance, for, in some vicarious manner, they too have been wronged.



The Genealogy of a Segmentary Lineage System

At any single level in such a society, segments look upon each other as jural equals; there are no superiors or inferiors. The only differences will be those of putative size, differences between more or less inclusive segments. These quantitative distinctions, however, are not translated into distinctions in authority; there is no commander or commanded; it is a body without a head.

We can speak of "levels" of the society in the same way that we can talk of its nested quality. The most inclusive level is that designated by the zero point, and it can be described in two different but complementary ways. First, it is that group of people so large that all the other segments (1 to 30) nest within it. Second, it marks the primal ancestor to whom,

eventually, all of the individuals in groups 1 to 30 can trace their descent. Again, it is not crucial (at this point) to speculate upon the historicity of this ancestor or the authenticity of the different descent claims; it is enough that the individuals within the society believe they are joined together by this hypothesized common ancestor.

From top to bottom, the units in the diagram become smaller and smaller. Thus the line of descent divides in half and creates two large segments, descended from 1 and 2, respectively. Segment 1 includes one half of the society—the smaller segments, 3, 4, 7, 8, 9, 10, 15, 16, 17, 18, 19, 20, 21, and 22. The descendants of 1 again divide, to form slightly smaller segments, 3 and 4, each of which has two large segments nested within it (7 and 8, and 9 and 10), which are divisible into four smaller segments. An identical pattern is repeated for the descendants of 4, 5, and 6. The smallest segments—those at the bottom of the diagram, numbered 15 through 30—are known in the literature as "minimal" or "tertiary" segments; they are the smallest corporate groups in the lineage structure. All minimal segments, no matter how widely separated they appear, are bound together by strands of common descent. Even segments 15 and 30, the farthest apart of all the pairs of minimal segments, can—albeit by a circuitous route—demonstrate common descent from point 0.

It has been necessary to trace the lineage arrangements in detail because of their profound and unusual legal ramifications. This means of social organization determines the lines along which conflicts develop and the means that are available for their adjustment. The principle of corporate responsibility transmutes individual disputes into intergroup conflict, and the scope, violence, and end result of such a conflict are dependent upon the ways in which conflict is allowed to spread. When conflict occurs, allies and enemies are determined according to a peculiarly symmetrical arrangement. Generally, fights expand until the forces engaged are roughly equivalent. In terms of a lineage chart of the kind we have been discussing, a fight spreads until two sections of the same level are committed. (A dispute between minimal segments 15 and 17, for example, would expand until 16 allied with 15 and 18 with 17, thus totally engaging the larger segments, 7 and 8. A quarrel between 15 and 16, however, would grow no larger, for it would be isolated within the embrace of segment 7.) The rule, then, is parity of forces. One part of a large segment cannot quarrel with part of another large segment without drawing in the other parts. Once the larger segments become involved, however,

the conflict will cease to spread. If the participants are the halves of the same large segment, the conflict has reached its maximal size.[7]

It may happen that both feuding segments find themselves under attack from an external quarter. In such an eventuality they drop their own quarrel, for the time being, in order to direct their attentions to the outside threat. A conflict *between* 3 and 4 would have the secondary effect of suppressing conflicts *within* 3 and 4, say, between 17 and 18 or between 9 and 10. The alliance of segments is determined by their lineage relationships, so that a description of tribal descent patterns is simultaneously a description of all the permissible patterns of group alliance and conflict. The process of coalition formation is known as "segmentary fusion." The relationship between patterns of alliance and specific lineage connections becomes clearer if (simply for the sake of example) we look at the behavior of individuals.

> A man who quarrelled with his father's brother's son (his first cousin on his father's side) would count on the support of his brothers, that is, of the minimal lineage of which his father is the head, while his opponent would similarly count on the support of *his* brothers. But if our first protagonist should quarrel with his father's father's brother's son's son (his second cousin on his father's side), then both he and his former opponent would join forces as members of a two-generation lineage sharing a common paternal grandfather, in opposition to the lineage, of the same order, to which his new opponent belongs, descending from their paternal grand-uncle. Of course in real life the fission and fusion of lineages takes place at far higher levels of segmentation, but the principle involved is the same.[8]

The description may defy those who have been brought up largely in the simple confines of the nuclear family, but then we do not depend upon kinship to do double, indeed triple, duty as political and legal framework as well. We expect law to keep conflict at a level at which it no longer proves socially disruptive, and, as we shall see, if we take segmentary lineage systems on their own terms, we find that the lineage structure contributes to precisely this end.

7. See John Middleton and David Tait, "Introduction," in Middleton and Tait, eds., *Tribes without Rulers* (London, Routledge and Kegan Paul, 1958).

8. John Beattie, *Other Cultures, Aims, Methods and Achievements in Social Anthropology* (New York, The Free Press, 1964), p. 101.

If we examine segments at any particular level (i.e. possessing the same number of smaller segments), we find the following shared characteristics. Each is more or less equal in number of individuals they include. This cannot be an absolute equality, but the tendency is for segments to split or fission when natural population growth begins to do real violence to the accepted concept of numerical parity.[9] Undoubtedly, such segments are equal in status (in other words, each has the same rights and duties); even a temporary imbalance in numbers does not eliminate legal status. Finally, the segments are wholly free of outside control, as this is commonly understood, and they are not subservient to a chief or council of elders. Only consensus on norms of behavior exercises a controlling influence.

How is it that a segment "knows" when to fission? It knows because natural increase is more than a statistic; it affects the ability of a group to function effectively. Excessive population may manifest itself in terms of problems of resource utilization, communications, or the ability to act corporately *vis-à-vis* other segments.[10]

There is apt to be a close relationship between lineage affinity and spatial contiguity—between descent relationships and the geographical distribution of segments. Basically, relatives by descent tend to live near one another. In the figure, the minimal units (segments 15 to 30) can be ranked according to the nearness or distance of relationship. As it happens here, lineage proximity is exactly reflected in the numbering, so that 15 is more closely related to 16 than to 17—as is true at every level in the diagram. Frequently, lineage proximity is thus reflected in the spatial distribution of segments, as among the Tiv, who inhabit an area of equatorial Africa near the western coast. Tiv segments, as is seen when their residence patterns are mapped, tend to live near those who are most closely related to them. Hence there is a high correlation between residence patterns and genealogy.[11]

The visible apparatus of law and politics is almost totally absent in segmentary lineage systems. There are no effective chiefs, nor well-defined

9. Ibid., p. 102.

10. A. R. Radcliffe-Brown, "Introduction," in Radcliffe-Brown and Daryll Forde, eds., *African Systems of Kinship and Marriage* (London, Oxford University Press, 1960).

11. Paul Bohannan, "The Migration and Expansion of the Tiv," *Africa, 24* (1954), 2–16.

councils, nor judges, nor courts, nor police. The role structure is so fluid that individuals easily slide into and out of the few political roles that can be identified. For this reason they are commonly called "stateless societies." The relationship between the terms "segmentary lineage system" and "stateless society" is tangled and imprecise. Many stateless societies are not segmentary lineage systems (e.g. the Eskimo), on this point there is general agreement. What is not as clear, however, is whether a segmentary lineage system must be a stateless society. Some anthropologists have suggested that a necessary connection exists between segmentary lineage and the absence of clear-cut political institutions.[12] This assertion, however hedged about with qualifications, has generated the counter assertion that there is no compelling reason for believing that such a relationship exists.[13] Whatever the distribution of merits in the dispute, its outcome need not affect the subject under discussion here.

The dispute is primarily concerned with the construction of an exhaustive and logically defensible system of classification for all political systems. If segmentary lineage was found to cut across a number of political arrangements, its utility as a classification criterion would be vitiated. But this is not our present task; all of the segmentary lineage systems to which we will refer are unambiguously stateless. Further, the general usage of "segmentary lineage" by anthropologists tends to support its restriction to stateless societies. Finally, the role played by segmentary lineage systems in this study is a laboratory role, so that they may shed some light on what we mean by the concept "law." The utility they may have for comparative legal studies is potentially great, and it stands quite apart from the problems raised in creating a general taxonomy of political systems. In the context of this study, it is enough that all of the segmentary lineage systems here considered are stateless, for the pivotal question is not "Are all segmentary lineage systems stateless?" but "When stateless societies are organized according to the principle of segmentary lineage, how are conflicts dealt with?"

Consequently, there are at least three categories of primitive stateless societies to which we will not have occasion to refer: (1) small, very simple communities that are engaged in hunting or food-gathering; (2) socie-

12. Middleton and Tait, "Introduction," in *Tribes without Rulers.*

13. The issue is discussed in detail in Aidan Southall, "A Critique of the Typology of States and Political Systems," *Two Political Systems and the Distribution of Power* (London, Tavistock, 1965).

ties that are made up of economically and familially related villages, each administered by its own council; and (3) societies in which control operates through a system of age sets, a formalized version of seniority rule.[14] The restriction to stateless societies that also achieve order through the descent system becomes clear when we juxtapose them with a far more familiar milieu, that of international relations, and it is to the latter that we now turn.

The peculiar distribution of resources in the social sciences means that we have a much clearer picture of such tribes as the Nuer and the Tiv than we have of international relations, which, in principle, are much more accessible to investigation. This fascinating paradox, that hard-won knowledge of the exotic often exceeds easily obtainable knowledge of the near-at-hand, suggests that what is needed is a kind of ethnography of international relations. In any case, as C. A. W. Manning indicates, any attempt at a definitive mapping of the "international cosmos" is at present a perilous undertaking.[15] But the attempt is only a search for definitive description. If we are satisfied with rather less, it is possible to sketch some broad outlines of the international environment. Until this is accomplished, any comparison of the normative systems of international relations and segmentary societies is manifestly an impossible undertaking.

There is, at the moment, no *lingua franca* of international relations, such that relationships across time, cultures, and disciplines can be easily communicated. On the other hand, international relations, like any other subject, cannot even be conceived of (much less analyzed) without representations. The correspondence between concepts and the real world is sometimes elusive, particularly when a single term is used variously, but conceptual frameworks are a prerequisite for thinking.

What, then, does international relations "look like"—what is the structure of the strange society of states? In the past, and in large measure in the present as well, international relations were, quite simply, the relations between legally defined sovereign states.[16] The emphasis is not now as strongly on definition in legal terms, but the implied primacy of the state remains and it colors all our perceptions, even when we find that it does

14. Beattie, pp. 145–46.
15. C. A. W. Manning, *The Nature of International Society* (London, G. Bell, 1962).
16. Ibid., p. 200.

not tell the whole story. The terms "state" and "nation-state" dominated diplomatic history so long that they became the principal categories into which international phenomena were sorted. Moreover, diplomatic history and international relations were, as fields of study, creatures of Western, European-oriented experience. Even at the highest levels of theory, propositions sought only to universalize what was often a culturally bounded experience. For a time, the "Europeanization" of the world made this a not untenable approach, although it merely placed clear historical limits on the structural configurations of international politics, these limits being the beginning and the end of European world hegemony.

Consequently, it is important to mark off boundaries in time as well as in space. When the boundaries are chosen without regard to the parochial experiences of the European continent, a wealth of unfamiliar international contacts comes to light. Cultural conflicts, multinational empires, and alliances of varying degrees of cohesiveness spring to view along the whole of the Eurasian land mass.[17] As the non-European political situations come into focus, they emphasize the cultural factor in the behavior of states. The world is not divisible only into a Europe of states and a hinterland of vassals and colonies but, rather, into a series of culture areas, each with its own patterns of international relations.

Culture areas can most easily be analyzed through concentration upon patterns of interaction rather than upon isolated events. These patterns reveal a structure that, even with allowances for cultural differences, maintains strong similarity to the segmentary lineage systems that were examined earlier. The most interesting work along this line has taken place within systems theory, for systems theorists have sought to emancipate themselves from an overemphasis upon international institutions. The institutional poverty of international relations in most regions and times makes the data of behavior much more useful.

Rosecrance, for example, utilizing standard works in diplomatic history, examined world politics for the period 1740–1960.[18] During this interval, of course, Europe was ascendant, and the utilized sources were Western in orientation; nonetheless, the analysis proceeds at a sufficiently high

17. The historical sweep of international politics on the Eurasian land mass is admirably conveyed in William H. McNeill, *The Rise of the West* (New York, Mentor, 1965).

18. Richard N. Rosecrance, *Action and Reaction in World Politics* (Boston, Little, Brown, 1963).

level of abstraction that it can serve for other culture areas as well. Rosecrance broke the 220-year period into nine consecutive international systems; in other words, nine separate configurations seemed relatively enduring. Patterns of behavior lasted long enough to characterize a particular era, and, more important, each system was largely a self-regulating array of states. Without the apparatus of international government, conflicts—at least for a time—were held in check. The result may in no sense have been "just" by any independent standard, but violent attempts to alter the status quo were limited. Eventually, of course, each system ran its course, decaying with each failure to hold violence in check, and, after a transitional period, a new self-regulating system emerged. What we know of the precolonial history of Asia tends to confirm this ability of regional groupings of states to stabilize their interactions.[19]

Kaplan and Katzenbach suggest that the differences in power distribution from the nineteenth-century balance of power to the bipolar system of the 1950s is translatable into different means of handling conflict.[20] The diplomatic minuet of the balance of power meant that states looked first to their own security, refrained from intervening in the affairs of others, formed alliances to stop an expansionist state, and offered generous peace terms to the vanquished, for the shifting alliance patterns made strange bedfellows. The 1950s were far different, with many states grouped for security around one of the nuclear superpowers, the United States or the Soviet Union. A group of so-called uncommitted nations stayed near the sidelines. The norms were quite different in the 1950s; intervention by the superpowers in the affairs of their satellites was common, as was the feeling that neither superpower had anything to gain from being generous to its adversary.

What we see in these examples is that stability and conflict management were maintained in invisible-hand fashion, not through international executives or parliaments but by the routinization of interstate behavior and consensus on permissible and impermissible conduct. Perhaps the sources of this self-regulation will become clearer if we look more closely at the

19. The best introduction to the history of non-European international relations is Adda B. Bozeman, *Politics and Culture in International History* (Princeton, Princeton University Press, 1960). For China, see Richard L. Walker, *The Multi-State System of Ancient China* (Hamden, Conn., The Shoe String Press, 1953).

20. Morton A. Kaplan and Nicholas de B. Katzenbach, *Political Foundations of International Law* (New York, Wiley, 1957), Chap. 2.

systems approach. Systems analysis asks three questions: (1) What are the components of the system and how are they coordinated? (2) What are the boundaries between the system and its environment? (3) What is the character of system-environment influences, and vice versa? [21] The first question, of course, is most germane to the present inquiry, for on its answer depend our conclusions about the sources of order. This initial question prompts two additional questions: What is the relationship between system and structure? and Is there a necessary relationship between a particular distribution of authority and systems analysis?

A system can be looked at as a structure over time, structure being a "snapshot" of the system at any particular moment. From the standpoint of analysis, the structures usually referred to are those that are perceived as relatively enduring. If, for example, we were to analyze diplomatic relations, we would be far more likely to include ambassadors as a structural component than ad hoc missions. An aggregation of structural snapshots, including both enduring and changing conditions, conveys movement, but each "frame," if taken out of sequence, is static. "Processes" are thus identified with recurrent patterns of movement over time, but "structure" consists of recurrent features that are abstracted from static analysis.

In a system, it is unnecessary to speak of "authority" as inhering in particular parts of international systems. It may be of special interest to seek the locus of authority, if there is one, but the search is in no sense mandatory. In the past, international relations were bedeviled by the search for sovereign power, an activity akin to the lawyers' search for the source of ultimate commands, but it is now clear that the international system can be studied without considering where authority lies. By definition, a system is a set of identifiable regularities in behavior. Once these behavioral data have been found, neither "authority" nor "command" nor "sovereignty" need be considered. Thus systems analysis looks first at what groups *do* and only later at the symbols they use to confer legitimacy on these actions.

The systems approach to international relations grew out of the body of general theory in the social sciences called "general systems theory." [22] The latter was an importation from biology, and the three questions mentioned earlier may in principle be asked of any organism, from a one-cell

21. Charles A. McClelland, "The Function of Theory in International Relations," *Journal of Conflict Resolution, 4* (1960), 303–36.

22. Ibid.

animal to a whole society. Initially, this appeared to offer a promising way of unifying many natural and social sciences. In any case, students of international relations now accept system either as part of a cohesive general theory or simply as a useful organizing metaphor. Although usage extends over a wide range, the common denominators are components that move, without outside control, through regular paths. The existence of hierarchical authority is less a necessary condition than a possible alternative. Consequently, the stateless qualities of international relations in no way detract from its systemness.

What, then, are the system's components? Is there, in fact, a single international system? In the past, barriers to human contact created multiple systems. We know that, as far as Europeans were concerned, the world was divided before the voyages of discovery into the "known world" and *terra incognita,* and there is no evidence that direct contact had been made between the Roman and the Chinese empires, although both were simultaneously at the height of their powers.[23] Now, however, we may with justification speak of a single international system. The ties of diplomacy, trade, and communication (and, as we shall see, conflict) define—at any particular time—an inclusive general international system, the widest area within which patterned activity occurs. This area has now extended into many of the backwaters that once were safely insulated from high politics.

Within the boundaries set by international interactions—within this all-inclusive general system—are smaller units, which are relatively self-contained islands of activity. These islands interact with the general system and with other similar enclaves of interaction, but they have sufficiently specific kinds of relationships in themselves to set them somewhat apart from the general system. Some of these subsystems we have no difficulty in identifying, because they have some rudimentary institutional expression: the Common Market or the Organization of American States. Others, such as the U.S.–Canadian system, we take much more for granted.

Can a U.S.–Canadian subsystem be said to exist for anyone but the outside observer? Is this not as much a construct that is imposed from the outside as a lineage system? Here, too, there is a subtle relationship between observer's construct and participant's reality. The term "U.S.–Canadian subsystem" ultimately points to real, observable relationships

23. Bozeman, pp. 162–73.

between the two societies, at the political, economic, and cultural levels, that are visible to ethnographer and participant alike. Even in ordinary discourse we speak of groupings that have no real institutional expression. What is "the Western alliance" and "the free world" but everyday speech equivalents of "subsystem"? We may question whether the evidence supports their continued inclusion in our political rhetoric, but this is quite another matter. Within the general international system there are subsystems, and, indeed, sub-subsystems within them. We can speak of an inter-American subsystem, within which nest sub-subsystems, defined in terms of dyads or triads of Latin-American states.

The international arena is filled with actors. The ties that bind them together are oftentimes tenuous, subtle, and fluctuating, while their much-prized autonomy seems very much to the fore. Sovereignty, the "fundamental myth of the modern nation-state," [24] is at once a reflection of fragmented power and a rationale for action. The apparent proliferation of new international actors who transcend the state has complicated the concept of sovereignty. Although it lacks its traditional explanatory utility, we shall later see that it can be employed in much the same way as lineage, i.e. as the idiom in which the fact of segmentation is expressed. The new international role of organizations, supranational communities, and the individual broadens the components of system and subsystem and calls for a reappraisal of the meaning of sovereignty.

The analysis of international systems also has proceeded in a strictly deductive manner, through the construction of what McClelland calls "symmetrical theory." "The theorist makes his way into all the nooks and crannies of a conceptual structure built in his 'imagination' until he gets all essential parts in the right places and in the right relationships." [25] Initially, the work of Morton A. Kaplan belonged in this category,[26] although (in collaboration with Nicholas Katzenbach) he demonstrated that such ideal constructions as a bipolar world often fall well within the range of experience. Similarly, Roger D. Masters has peered into an imaginary future by constructing a multibloc model of the world, not corresponding

24. M. G. Smith, "A Structural Approach to Comparative Politics," paper prepared for delivery at the 1963 Annual Meeting of the American Political Science Association, New York, September 4–7, 1963.

25. McClelland, "The Function of Theory in International Relations," p. 315.

26. *System and Process in International Relations* (New York, J. Wiley, 1957).

to anything we now know in international relations but consistent with what we can see as a possible future configuration in world politics.[27]

Each of these models has its own characteristics and each bears a distinct relationship to the real world; taken together, however, they evince some important common motifs. First, they see international relations as ultimately stateless. This is not the contradiction in terms it may at first seem, for it means only that states must function in a stateless environment. The "system" is merely a description of habitual modes of interaction, which neither commands nor controls in the conventional sense. Preservation of systemic stability is due to some form of self-regulation rather than to a clearly constituted superior authority. Second, all of the models perceive a nested quality in international relations: the state system, within international subsystems, within the global system. It is not a matter of one level commanding those below but, rather, of relative degrees of inclusiveness. Third, a subtle balance is manifested between the system and its components. The components, be they states or multistate subsystems, have their autonomy. The reach of international institutions tends to be small and the coercive powers of large nations upon satellites ebbs and flows with circumstances. Over the long run, it is a milieu of high independence, but along with this autonomy there is a recognition of belongingness, of community. It may be only the community of immediate allies, but "system consciousness" is present. Perceptions of mutual self-interest and cultural affinity spin their web.

Fourth, most of the models pay little explicit attention to international law (Kaplan and Katzenbach are the obvious exception), but their emphasis upon order and pattern belies the nonlegal surface. The self-regulating system, with its own mechanisms for handling disorder, is the very stuff of law, although the term "law" is scarcely mentioned. Fifth, within the limitations set by the system there is activity. Alliances form and dissolve; conflicts germinate, erupt, escalate, and die down; subsystems interact within the general system. In the overwhelming number of cases, however, this is *patterned* action, which allows for surprisingly little caprice.

We may already see some "family" resemblances between segmentary lineage systems and international systems, but are these family resem-

27. "A Multi-Bloc Model of the International System," *American Political Science Review, 55* (1961), 780–98.

blances or simply chance correspondences? What we see is, in fact, a basic structural isomorphism, despite all surface dissimilarities. The strands that historically connect primitive societies and international relations have yet to be wholly sorted out; nonetheless, at least two of the strands are identifiable. First, there has been a tendency to regard both groups as examples of a "state of nature." [28] Different eras make international relations seem, by turns, Hobbesian or Rousseauian, but in any case prepolitical. Only subsequent explorations by anthropologists have demonstrated the fallacy of calling a stateless society prepolitical. The second, and more immediately relevant, strand is the intuitive perception that primitive and international law are bound together. This goes back at least to Sir Henry Maine, who perhaps better than any other man of his time knew the influence social structure exerts on law.[29] This second motif finds its bluntest contemporary spokesman in an anthropologist, E. Adamson Hoebel: "International law, so-called, is but primitive law on the world level." [30]

Observations of this kind are nevertheless analogies, however clear the original intuition. The most theoretically powerful as well as the most precise comparisons have been made only in recent years, as political scientists gained access to the rich materials of social anthropology. Only then could they pass beyond intuitive flashes to sustained analysis. Although the literature is exceedingly small,[31] it gropes for a route past mere analogy to demonstrable structural identity. Masters indicates four major areas of congruity: (1) International relations and stateless primitive societies lack formal government. (2) Both are so-called self-help systems, in which rights are directly enforced by the actor, not by a political institution. (3) Bargaining and customs generate rules of conduct, not legislatures. (4) The role structure usually is so fluid that political units serve many social functions. Put somewhat differently, the last point means that

28. Masters, "World Politics as a Primitive Political System," *World Politics, 16* (1964), 595–619.

29. See Henry Sumner Maine, *International Law* (London, John Murray, 1894), p. 13.

30. Hoebel, *The Law of Primitive Man,* p. 331.

31. See e.g., Masters, "World Politics as a Primitive Political System"; Michael Barkun, "Conflict Resolution through Implicit Mediation," *Journal of Conflict Resolution, 8* (1964), 121–30; and Richard C. Snyder and James A. Robinson, *National and International Decision-Making* (New York, The Institute for International Order, 1961).

the minimal components of the system are functionally self-sufficient, which enables them to act autonomously. Functional specialization, which in other circumstances would entail the centralization of coercive force, is absent.

Here, then, is a dual similarity, of structure and law. Let us make clear what the former means before we pursue the latter. Both societies are stateless, self-regulating systems, with autonomous but nested components. Along with this structural isomorphism, there seem to be similarities in the legal systems as well. It is one of the theses of this study that legal similarities flow from the structural isomorphism. For this reason a legal analysis of either society floats in a kind of limbo until it is related to the society itself. In considering the possibility of isomorphism, it is necessary to abstract pure structure from the particular setting in which it is embedded. Every comparison involves the selection of various general characteristics as relevant and the dismissal of other, particular features —for the purpose at hand—as irrelevant. This is even more true of a cross-cultural comparison, in which particularistic, culture-specific factors have the highest initial visibilty. In the comparison at issue here, we have, on the one hand, a small and remote (not to say exotic) group of societies; on the other hand, we have the arena of international relations. The former is far removed from the experience of everyone but social anthropologists, and the latter is forcefully injected into everyday life through the mass media.

Consequently, we must draw pure structure from its culture-specific accretions. Smith, for instance, makes a distinction between segmentary structure per se and its manifestation as a lineage system.[32] Genealogy provides only "the dogma and idiom of governmental segmentation." Just as ideologies provide a language of discourse and legitimation for states and international relations, there are comparable languages for segmentary lineage systems. In the present case, in effect, we are waiving genealogical considerations in primitive societies and the ideology of sovereignty in international relations so that we may gain a better view of structural likenesses. Later, we will examine both idioms in detail, because both play identical legal roles. Once these symbols have been placed to one side, the pure structures of segmentary lineage systems and international relations are seen to be remarkably similar. The absence of sovereignty in the latter or of genealogy in the former makes no difference—

32. M. G. Smith, "On Segmentary Lineage Systems."

again, for present purposes. The distribution of authority within the system must be considered apart from its unique rationale. Indeed, without this type of separation—without the existence of "invariant points of reference" [33]—no true comparison would be possible.

Paul Bohannan calls the resulting structures "multicentric" because, in both, power is distributed to multiple loci; it is not concentrated in a single set of institutions.[34] Also, these two multicentric societies seem, on casual examination, to produce characteristic legal systems. Specifically, of course, these are Falk's "horizontal" systems, referred to earlier. Although international systems have succeeded one another through time, there was never much likelihood that an enduring vertical system would arise on a global scale. From the great empires of the ancient world to totalitarianism in our own day, the spread (at times) of hierarchically organized subsystems notwithstanding, the overall environment has remained stubbornly stateless. Indeed, as we will show later, the entire character of international law tacitly recognizes the multicentricity of international relations, just as primitive law takes due account of the power fragmentation that segmentary lineage expresses.

Segmentary lineage systems and international relations, in summary, are stateless societies whose major structural characteristics are substantially the same. Both consist of components that interact in regular ways, but there is no centralization of power that might produce a functioning hierarchy of command. Each component unit has its measure of autonomy and retains this autonomy in principle, even when, in practice, discrepancies in unit size seem to contradict the axiom of formal equality.

Having taken this necessarily brief look at the structural side, and having seen the initial congruity between structure and law, it is time that we look further into the roots of law, but we shall, for the time being, pursue law through a roundabout route. We might approach it directly, of course, as much of the legal literature does, but there is a risk involved; namely, that we shall see it as a closed system, cut off from the society at large. It seems, then, to pursue its own logic, and coherence is attained only at the price of a high measure of social irrelevance. Instead, we shall pursue the

33. Gideon Sjoberg, "The Comparative Method in the Social Sciences," *Philosophy of Science*, 22 (1955), 106–17.

34. Paul Bohannan, "The Differing Realms of the Law"; see also Bohannan's *Social Anthropology* (New York, Holt, Rinehart, and Winston, 1963), p. 282.

longer and more tedious method of moving from the society, as it were, upward to the law. The metaphor of direction is not lightly taken, although it implies that the law is a kind of "superstructure" that is added to society rather than an exalted Platonic realm.

The specification of structure has set the stage for an examination of some of the behavior that goes on within it. Of all the activities that engage attention in everyday life, law, of whatever stripe, has always seemed inordinately concerned with conflict. Even if conflict does not immediately enter into a legal problem, we have only to probe slightly deeper to find that law is being used to forestall an imagined conflict in the future.[35]

There is another reason why conflict is a logical next step. International relations and the folklore of primitive societies make much of conflict, but the belief that both represent a state of nature is simultaneously naïve and perceptive. The law of primitive man may not be precisely the "law of the jungle" (in our pregnant phrase), any more than war is the "perpetual state" of international relations, but conflict is prominent in both, sufficiently so that it seems a hallmark of multicentric societies.

To the casual observer, the very prominence of conflict is indicative of lawlessness. But is this really so? Does law really seek to eliminate conflict from our midst? If this *is* the case, it has signally failed, even in our own society.

35. Hart, *The Concept of Law,* p. 28.

3. Integration and Conflict

It may be true that a world without conflict would neither need nor have a legal system, but certainly it is not true that a legal system guarantees the absence of conflict. Furthermore, the Garden of Eden, which until the intervention of the serpent was a realm without conflict, would doubtless have been a boring place to live. Conflict is so much a part of every society that it is difficult to imagine living in its absence. To ask a legal system—any legal system—to exorcise conflict is to ask the impossible. Indeed, conflict lies near the heart of our own legal system, for the adversary process is sublimated combat.

This being the case, it is far more productive to inquire into the nature and distribution of conflict than to call for its abolition. As long as tangible and intangible goods are scarce—perhaps as long as we retain our present genetic makeup—conflict will be with us. Because it cannot be abolished by fiat or by a new twist in legislative draftsmanship, it must be understood and managed. Horizontal legal systems have their own ways of doing this, and, in order to make clear what these means are, it is necessary to specify the kinds of conflict that multicentric societies produce.

Conflict in a highly integrated society seems to be different than in one that is loosely knit. A number of persons or groups of persons can be considered integrated if they identify both with each other and with an image of a larger, all-embracing group, and if there are mechanisms that accommodate or neutralize forces that tend to disrupt unity. Obviously, the more homogeneous a society, the less pressing its need for neutralizing mechanisms. Persons still will disagree and conflicts still erupt from time to time, but the job of dealing with deviant behavior in a small group is inherently easier than in a large group. Face-to-face contacts prevent a group from fragmenting because they place heavy social pressure on the deviant minority. Of course, the possibility of rifts remains, as strife in small sects and large families attests. All other things being equal, however, it seems that a high degree of face-to-face contact makes the development of institutional means for handling behavioral deviance largely unnecessary.[1]

As a group becomes more heterogeneous in composition, integration becomes more difficult and, consequently, more problematic. The polyglot ethnic composition of the United States, Israel, and Switzerland places strains on integrative goals, but the goals themselves are well within reach.

1. Richard D. Schwartz, "Social Factors in the Development of Legal Control," *Yale Law Journal, 63* (1954), 471–91.

The problematic quality of national integration now can be seen with greater vividness than was possible a few decades ago, for we have before us the unfortunate example of Africa, where national boundaries were drawn in cavalier disregard for tribal composition. A community that is sufficiently uniform to bypass trends toward separatism is much less common to the political scientist than the opposite, for even nation-states that lie within well-defined cultural borders must deal with fragmenting tendencies. From the Vendéan uprisings in Revolutionary France to the American Civil War, even the most securely anchored polities had to cope with the threat of disintegration.

We shall be looking, therefore, at the balance between centripetal and centrifugal forces in segmentary lineage systems and international relations. The latter situation seems self-evident, but even the former, despite ethnic uniformity, is rent with separatist tendencies; indeed, a multicentric structure makes this so. The significant fact is that a minimal level of integration is maintained even where it seems most imperiled.

Integration is measurable in terms of the pressures that play upon groups and individuals. "Cross-pressures analysis," although systematically used by sociologists since Simmel,[2] has not been widely applied outside the context of individual, developed states. This fact notwithstanding, there is no reason why it *should* be limited; it is a mode of analysis that is superbly suited to the problems of class strife under industrialization, and, in a more general way, it is equally well suited to all settings of intergroup conflict.

Briefly put, cross-pressures analysis assumes that the society in question is composed of groups (a system made up of subsystems). It also assumes that each group is, in part, identified with a private set of goals that differ from the goals of other groups. To this extent it parallels the group theory of politics. Finally, the key to societal integration lies in the way loyalties are distributed through these groups. When components of the overall system are forced to ally themselves with one another, the society is knit together, for the allies set aside all quarrels they may have among themselves. Put one way, it is entirely a matter of loyalties. A group that is loyal only to itself is potentially an enemy to all others. Shared loyalties introduce the prospect of unity.

2. See Georg Simmel, *Conflict and The Web of Group Affiliations* (Glencoe, Ill., The Free Press, 1955), pp. 125–95; and Lipset, *Political Man*, pp. 13–14, 50, 77–78, 211–26

Put another way, it is all a matter of how conflicts are distributed. Loyalty and enmity in a sense become two sides of the same coin. The existence of one need not preclude the existence of the other, which is superbly captured in the phrase "Politics makes strange bedfellows." The integrated society is a curious mixture of loyalty and enmity, so distributed that few groups are totally and completely at odds. By the same token, the heterogeneity of group goals makes total and complete agreement just as unlikely. The term "cross-pressures" refers to the fact that individuals and groups that are caught in what Simmel called "the web of group affiliations" are subject to the calls of both loyalty and enmity. They are pulled in contrary directions in conflict situations.

We can see this more clearly if we shift for a moment to the familiar example of the industrialized state. Let us assume that, in a given society, individuals can be identified by three characteristics: race, religion, and economic status. We shall further assume that, for any of these characteristics, there are only two alternatives, e.g. "rich" or "poor." If all the members of one race also provide the sole membership of one economic class and one church, the society is split down the middle. Some citizens find themselves in one group, by virtue of overlapping membership in three subgroups; but all of the other citizens also find themselves in a single group, by virtue of three different racial, religious, and economic identifications. In practice, such a state would have a severe integrative problem, and, indeed, the abstraction above is not very different from the situation that obtains between French and non-French Canada. An integrated society, by contrast, will be characterized by shared group memberships: members of one race would be members of different religions and different economic classes.

In the latter situation, the outcome would be diminished group autonomy and diminished group antagonism. An economic group could hardly act corporately at all times if its members differed in, let us say, race and religion. Racial and religious loyalties might well collide with the dictates of economic self-interest. Severe conflicts could not be indefinitely maintained, for economic strife would require that co-religionists and co-racialists fight each other. In primitive societies, a vengeance group will have difficulty exacting blood vengeance if its members live in villages that also are occupied by the group upon which vengeance is to be taken. Vengeance is not thereby made impossible, but the price paid in social disruption is raised. Hence there will probably be a tendency to moderate the

conflict, if only in the interests of convenience. Similarly, groups of states will have difficulty escalating a conflict if both groups also belong to a third group. Furthermore, if a state's "national interests" appear to collide with the interests of an alliance to which the state is a party, some means will be sought to take the deviating state off a collision course. The attempts, of course, may not succeed, but the incentive is there.

This is not to say that conflict mysteriously evaporates in the process. The term "conflict resolution" is often a misnomer, for it implies conflict elimination, and the chimera of conflict elimination has plagued the social sciences far too long. There is, instead, a metamorphosis of conflict, a sequence of events in which a dispute is redirected and channeled into more socially acceptable and system-preserving paths. In a sense, it is sublimated. In this process the level of violence is reduced, and eventually the conflict may be expressed in a purely verbal manner—or, in the rare case, not at all. The disagreement about ends or means remains, but in a diluted and much less destructive form.

Every pluralistic society has pluralistic goals. There is no reason why different groups should want the same things, although the disparities in their desires are counterbalanced by the values that are held in common. The tangibles and intangibles to which a people attach value can never be limitlessly abundant. Indeed, in the presence of infinite abundance, we could not speak of value at all. Because the world we live in is one of scarcity in both material and nonmaterial values, and as long as this is the case, conflicts will arise when these "goods" become the objects of incompatible group interests. If there is little or no overlap in group memberships, cross-pressures cannot develop. As a consequence, there will be no conflicting allegiances and each group will go its own way, seeking its own goals, with minimal concern for the interests of others. However, an overlap in group memberships and the generation of cross-pressures means that units in dispute in one context may be allies in another, and no single conflict can rationally be carried to its ultimate point, for the ultimate point would be social suicide.

Multiple group memberships create constantly shifting coalitions, in which yesterday's adversaries become today's allies; and beneath each conflict lies a hidden stratum of consensus. No group is so alienated from others that it does not share interests with them. Thus multiple forces bear upon each group, pulling it first this way and then that. None can tend too far in one direction, for a countervailing force pulls it back. Thus, para-

doxically, stability is one of the fruits of properly distributed conflict. For every exercise of egocentric whim, opposing forces come into play, in the service of moderation. The historical model for this might be the War of 1812, and its opposite would be the total annihilation of the Albigensian Crusade.

If I wish to lead my state on a particular course in the pursuit of what I take to be its national interest, I must reckon with the fact that this course jeopardizes the future of the alliance to which I belong. Thus I have some incentive for modifying the policy in question, to make it compatible with the conflicting but nonetheless important alliance-preserving interest. If Gaullist foreign policy seems to fly in the face of this argument, it is well to bear in mind that the French repudiation of NATO came only after the Russo-American *détente* and the fragmentation of the Warsaw Pact solidarity. Conflicts, to be sure, can be distributed so that they polarize a society, but they can also cut across one another so as to create a community of interest among erstwhile antagonists. Further, polarization at one level may mean integration at another. During the bipolar period of the 1950s, when *inter*bloc conflict was high, *intra*bloc integration also was high. Indeed, the very existence of warring blocs assumes the ability of each to act corporately—to be integrated.

Two caveats are in order at this point. First, an idealized version of a self-integrating system tends to break down in the real world. The distribution of conflicts in a functional manner depends upon the group-composition of the society. Physical mobility, economic development, and the breakdown and reconstitution of the class system can alter the multiple group memberships upon which integration depends. Although, in recent years, Western societies have developed so that they distribute conflicts more and more randomly—at least in comparison with the late-nineteenth century—we have seen that, under conditions of international bipolarity, they are distributed rather systematically. Nevertheless, it is axiomatic that, at *some level* of any social system, cross-pressures will be found, for the alternative is a social universe of utterly homogeneous human billiard balls.

Second, much that has been written about cross-pressures seems to fly in the face of the discussion we have just concluded. It is frequently asserted, for example, that individuals' usual reaction to cross-pressures is paralysis.[3] Also, that cross-pressures retard rather than advance integra-

3. James S. Coleman, "Social Cleavage and Religious Conflict," *Journal of Social Issues, 12* (1956), 44–56.

tion, for integration requires all major transactional indicators to "pull" in a single direction.[4]

To see cross-pressures as potentially paralyzing is to argue in the spirit of the medieval logicians who set themselves the puzzle of an animal placed equidistant between two bales of hay. The animal may, as the story comes down to us, starve to death in the ensuing approach-approach conflict. But what may in some contexts be social stagnation (the analogue of starvation) may in other contexts prevent a society from being torn to bits. This leads to the second criticism: that the conditions required for producing integration are quite different from those that are required to sustain it—and it is the latter problem that is most relevant to legal analysis. There is, in addition, a manifestly dynamic element in cross-pressures situations that belies the deductive conclusion of paralysis. If there is an incentive to moderate the level of conflict, conflict itself remains, which is attested by the existence of intricate patterns of alliance. Indeed, it may be true that, within an individual (a voter, for example), intrapersonal conflicts lead to inaction, but, within a group setting, the consequence is a wider field for future alliances.

The tacit assumption is frequently made that a society either is integrated or it is not. The integrated society, of course, is a pure type. It may or may not be approximated in the empirical world, for the examples we find seem to lie always in the middle of a continuum, not at its extremities. Integration, then, is a relative term, and is present in degrees.[5] It is possible to lump whole social systems into "high integration" or "low integration" pigeonholes, and for specific purposes this is a useful procedure. The richness and complexity of phenomena, however, also play their part, and a single social system may, upon examination reveal great intrasystemic variations in integration. Thus it is possible to compare integration in the United States (as a whole) with integration in Switzerland, but the price that is paid for this exercise in abstraction is the equally interesting integrative differences between, let us say, the Miami and the Los Angeles metropolitan areas.

This discussion has been involved and prolonged, and at times far removed from the law, but law, like every institution, has a kind of social infrastructure, a series of supports that allow it to function. Furthermore,

4. Karl W. Deutsch, "Transaction Flows as Indicators of Political Cohesion," in Philip E. Jacob and James V. Toscano, eds., *The Integration of Political Communities* (Philadelphia, Lippincott, 1964).

5. Philip E. Jacob and Henry Teune, "The Integrative Process," ibid.

law at its best is a problem-solving mechanism, and the problems that are fed into it are societal problems, determined in part by the way a society is organized. Primitive and international law are sufficiently unorthodox in their surface manifestations to demand examination not only of their specific content but of the social matrix in which they operate. As it happens, the intellectual superstructure of law reflects the degree of integration in a society in two ways. First, changes in integration within a society alter the scope and effectiveness of law. Second, different degrees of integration are associated with different levels of conflict, and hence different burdens are imposed upon the legal system.

What, then, determines the degree of integration? It has long been thought that physical proximity is a sine qua non. Although in large measure the truth of this generalization survives, it had long been accepted without attempts at verification; [6] it seemed simply a commonsense judgment. In fact, integration always joined contiguous areas, despite the uncomfortable fact that such contiguous areas as France and Germany and Austria and Italy seemed always to be at each other's throats. Although sheer physical proximity can hardly be an obstacle to integration, it is not always a sufficient condition. Today, indeed, it may no longer be even a necessary condition, for at least two factors can substantially modify physical distance.

The inability to move about more or less at will has historically inhibited integration; topographic obstacles, such as mountains and unnavigable rivers, served to set apart peoples who physically were quite close.[7] The technologies of transportation and communication are ways of modifying physical distance and important factors for primitive and international societies—the former still suffering from the discontinuity between natural obstacles and a rudimentary technology, the latter undergoing constant relational alterations as technology grows at an exponential rate. One is put in mind of Bertrand Russell's remark that improvements in transportation, instead of cutting down on the time spent in getting from place to place, merely increase the area over which we travel.[8]

We live, in addition, in a sensory world, in which stimuli are organized and structured to form an internally coherent picture. The filtering and mediating effects of cognitive processes differ from one society to another.

6. Ibid.
7. Frederick J. Teggart, *Theory and Processes of History* (Berkeley, University of California Press, 1960), pp. 251–53.
8. In Daniel Bell, *The End of Ideology* (New York, Collier, 1961), p. 230.

Groups that are physically cheek by jowl do not necessarily view the world in identical terms. Not a single reality "out there" is perceived similarly by persons of diverse cultures; rather, there are multiple realities, each growing out of linguistic and cultural inheritances.[9] Consequently, physical proximity need not be identical to perceived proximity. The contiguity of white and Negro communities is misleading as long as knowledge processes on one or both sides are turned inward. Social distance and basic-value incompatibilities can wall off nominal neighbors, just as shared conceptions of community can unite physically remote peoples—if, of course, the technology of contact so permits. For analytic purposes, therefore, it is necessary to modify concepts of physical distance in integration to the extent that the process also is dependent upon perceived distance.

If we can assume that perceived distance creates no insurmountable barriers to regular interaction, the factor that is of primary importance in integration still appears to be the traffic that passes between the units. The history of European integration in the post-medieval period shows that nation-states arose at points of high interaction.[10] Indeed, national boundaries may be conceived as breaks in the paths that were traced out by interactions. In other words, we often find that exchanges of messages, capital, persons, and so on within national borders exceed the number of such exchanges across borders. If net across-border transactions are greater, there is reason to believe such an area is ripe for political integration.

The transactional approach to the study of integration divides all potential interactions into three types: the movement of messages, the movement of goods and services, and the movement of persons.[11] Clearly, without a minimal degree of transactional contact, even groups in the closest physical proximity will remain cognitively apart, for without exchanges between groups they remain unknown to each other. Even deep-seated enmities depend upon interaction. It may be simplistic to say that intergroup friction can be ameliorated by familiarity, for this piece of folk wisdom is balanced by the equally venerable belief that familiarity breeds contempt. Two groups between which no meaningful contact passes, whether economic or social, are unlikely to form attitudes of any sort to-

9. Edward T. Hall, *The Silent Language* (Greenwich, Conn., Fawcett, 1959).

10. Karl W. Deutsch, "The Growth of Nations," *World Politics, 5* (1953), 168–95.

11. Jacob and Teune, "The Integrative Process."

ward each other, neither positive nor negative. The axiomatic nature of the interaction-attitude linkage notwithstanding, there is a tendency to see it solely as a device for turning enemies into friends.

How can we tie the foregoing threads together? First, we have seen the indissoluble tie between the existence of cross-pressures on the one hand and a randomized distribution of group members and intergroup conflicts on the other. If a distribution does not tend toward randomness (as opposed to total polarization), a society would fission rather than retain some common purpose.

Second, there is a relationship between multiple overlapping group memberships and the dynamic factor in integration: interactions. An inventory of interactions is simply another way of establishing the identity of a system's constituent parts. If individuals are to think of themselves as sharing a group membership, they must perforce have contact with each other, or the sense of identity will melt away. Small groups feel they are parts of a common, larger organization as a result of the messages and physical contacts that pass among them. Transactions are the dynamic of integration and group memberships are the artifact, the result of countless interactions that occur in accustomed procedures. Again, what we call structures are simply processes whose rate of change is slow enough to give an appearance of permanence.[12]

Third, a polity is a more or less integrated collection of persons. By definition, a unicentric/vertical social structure is more highly integrated than a multicentric/horizontal structure. What has all this to do with the generation and management of conflict? The loci of power, the ties that persons and groups have with one another, the forces that deter and that attract decision-makers—all these are the "underground" questions of legal analysis. Answering them is impossible unless we first understand the integrative and disintegrative forces in society. If "legal system" is not limited to the parochial confines of courtrooms and law offices, it is—in the end—merely a product of its society. For this reason we turn to an examination of the specific centripetal and centrifugal forces that are at work in primitive societies and international affairs.

On the surface, there seems to be very little that binds segmentary

12. Karl W. Deutsch, "Integration and the Social System: Implications of Functional Analysis," in Jacob and Toscano, eds., *The Integration of Political Communities.*

societies together—the institutions we think of as providing "social cement" do not exist. It is easy to look to the autonomy of segments and to pronounce the collection of groups no society at all, but this would be a dangerous oversimplification. As one moves outward from any point of interaction in an uncentralized society, "controlled cooperation simply becomes weaker as one moves from the point of focus outward." [13] The rub, of course, is the confusing multiplication of points of focus. One always seems to be at a center, because, from a politico-legal standpoint, the center is wherever one happens to be at the moment. Consistent with this observation is a further conclusion of social anthropology: The smaller the local group the more integrated it is, and the more face-to-face contacts among its members.[14]

Genealogical relationships often govern living patterns, so that the most closely related groups occupy physically adjacent areas. Physical separation comes to correspond with tenuous ancestral ties. Closely related minimal segments live in a common area; thus perceived proximity comes to coincide with physical proximity. Genealogical calculations determine whom one perceives in close terms and in distant terms; hence genealogy becomes the lens through which the social world is seen and set in order. What is true for one pair of minimal segments is true for all other adjoining pairs. Physically, the farther one moves from each, the deeper he moves into territory that is occupied by distant relations. As genealogical ties grow weaker, so does perceived proximity.

A corollary is that minimal segments whose perceived proximity is closest interact with each other more than do cognitively remote segments. Genealogy and the problems of traveling over hostile terrain are mutually reinforcing. Physical contact is easiest with those between whom contact is most desired and accepted. If we grant this, it brings into play still another factor—again, cross-pressures. It is important to know what effect the coalescing of genealogy and physical contact has on overlapping memberships; and this importance is clear: The greater the overlaps, the greater the integration.[15] Kinship is not the only bond; some of the other

13. See Alvin W. Wolfe, "The African Mineral Industry: Evolution of a Supranational Level of Integration," *Social Forces, 11* (1963), 153–64.

14. See Evans-Pritchard, *The Nuer,* pp. 149–50.

15. Robert A. North, Howard E. Koch, Jr., and Dina A. Zinnes, "The Integrative Functions of Conflict," *Journal of Conflict Resolution, 4* (1960), 355–74.

bonds are common land area (which would become even more important if ethological research turns out to be applicable to human behavior), common shrines, and a rudimentary degree of economic interdependence —aside from the occasional presence of common enemies. A member of any minimal segment simultaneously belongs to a number of groups, although the strength of commitment varies: to his own minimal segment, to the more or less integrated and related minimal segments around his own, to the next-higher-order segment, and, eventually, to the society as a whole. From every individual and for every minimal segment we could trace a set of concentric circles that diminish in clarity as they increase in diameter.

In one classic segmentary society, the Nuer of the southern Sudan, economic exigencies require interdependence among adjacent groups. Because resources for cattle are few and widely scattered, ecological factors demand that neighboring groups share these resources, for any attempt to monopolize them would be self-defeating. Elements of the tribe must move about to take advantage of the sparse seasonal rainfall, and in these migrations they pass through each other's areas. Noncooperation would inevitably result in the breakdown of the migratory patterns upon which all depend. There are ties of friendship between these economically interdependent groups, but friendship diminishes as distances increase. "Between districts at the extreme ends of a tribe, [friendship] hardly exists." [16]

Ecological needs are not the only source of cross-pressures. Lineage is less prominent among the Tallensi than among the Nuer, and additional, nonlineage kinship relations cut across Tallensi links of descent, as do common religious obligations.[17] Furthermore, the maintenance of minimal integration depends upon the physical isolation of corporate groups, for cross-pressures can scarcely develop in the absence of interactions. Anything that reduces isolation enhances integration, thereby increasing the cohesion of a large group at the expense of smaller groups. Any dispersion of the members of a corporate group has the effect of creating additional cross-cutting memberships, at the same time making corporateness more difficult to maintain. As a general rule, in societies in which descent is unilineal (i.e. coming down through one parent only), and segmentary lineage systems are one variant, political corporateness is in-

16. Max Gluckman, *Custom and Conflict in Africa* (Glencoe, Ill., The Free Press, 1955), p. 7.

17. Beattie, *Other Cultures,* pp. 148–49.

versely related to the extent that group members are physically dispersed.[18]

Insofar as the integrative process is concerned, the relevant factor therefore is not segmentation per se. Indeed, such societies, taken as wholes, are remarkable for their capacity somehow to survive the autonomy of their component parts. Instead, the important factor is the segments' relationships with each other. As long as the basic structure of the societies is segmentary, the principal loci of cross-pressures will be the minimal segments. Thus they are the most highly integrated, but, in keeping with the character of a multicentric structure, each is small and all are widely distributed over the territory the society occupies. Each is an interactional node (the point at which religious, economic, political, and kinship obligations bring related individuals into daily contact). As segments move outward through our concentric circles of diminishing integration, overlapping group memberships diminish. Interactions multiply at the site of the minimal segment and at its borders through contact with neighboring groups, and it is here that the most intense and most numerous cross-pressures occur. In small areas, strong, often conflicting, allegiances are at work. In some quarrels, one allegiance is activated to the detriment of another; at other times the situation is reversed. The shifting and ambiguous nature of alliances reduces the chance that the immediate area of the minimal segment will become polarized—literally, the site of warring camps.

Under normal circumstances, the consequence of the decrease in cross-pressures as one moves away from each minimal segment is that the larger segments remain amorphous. This is the usual state of things, but, as was noted earlier, large segments achieve more than nominal identity in time of conflict. Conflict that involves an antagonist of more than minimal segment proportions acts to "galvanize" its genealogical counterpart: a common enemy brings previously separate (even feuding) smaller units together to offer broad resistance. As we shall see, viewing the general view of segmentary lineage systems as tightly knit on the lowest level, diminished cohesiveness is related to increased size, which in turn determines (1) the frequency of conflicts and (2) the intensity of conflicts that are severe enough to actualize larger segments as functioning corporate bodies.

18. Harumi Befu and Leonard Plotnicov, "Types of Corporate Unilineal Descent Groups," *American Anthropologist, 64* (1962), 313–27.

Inferring cross-pressures came late, and selectively, to the study of international relations. Not surprisingly, it has thrived only in the study of international organizations. First, the United Nations and its affiliated agencies provide ample sources of data and a superb means for ascertaining the outcome of conflicts: voting records. Second, the UN's quasi-parliamentary nature makes it the international institution that is closest to the state institutions in which cross-pressures had been noted. Although it is by no means a full and complete representation of the international system, it is the closest thing we have to such a microcosm. Cross-pressures in the UN setting on two levels: the delegate level and the delegation level. An individual delegate, as he is socialized to organizational norms, is pulled in opposite directions by the courses these norms dictate and by the contradictory policies his national superiors advocate.[19]

The analysis of voting provides a better indicator, however, for it shows the extent to which various groupings of states overlap. Hovet's analysis divides the General Assembly into five groups: according to geographical distribution, regional organization, common interests, caucusing patterns, and temporary collectivities. The Afro-Asian caucasing group and the Soviet bloc provide apt polar examples. The members of the former are widely distributed throughout other groups, and hence this caucusing group is the group most prone to internal divisions, which limits its ability to take extreme and consistent positions. By contrast, the Soviet bloc possesses the fewest cross-cutting memberships, most often acts in a corporate manner, and is one of the groups that votes least frequently with the majority.[20] As a whole, the organization is integrated to the extent that its constituent parts are joined rather than isolated.

A more recent and explict analysis (Alker's and Russett's in 1965 [21]) sees unity on a global level as partly dependent upon the generation of ties across the familiar East-West division. At present, overall cohesion seems to have diminished, suggesting the lessening of cross-pressures throughout

19. Chadwick F. Alger, "Non-resolution Consequences of the United Nations and Their Effect on International Conflict," *Journal of Conflict Resolution, 5* (1961), 128–45.

20. These observations are implicit in the data presented in Thomas J. Hovet, *Bloc Politics in the United Nations* (Cambridge, Harvard University Press, 1960), pp. 46–111, 123–27.

21. Hayward R. Alker, Jr., and Bruce M. Russett, *World Politics in the General Assembly* (New Haven, Yale University Press, 1965), pp. 253–74.

the organization. The immediate consequences are an increase in group cohesion and in the extremity of policy positions. This validates the frequently made observation that the world itself is made up of islands of integration that have little in common. Insofar as the UN is a microcosm, it reflects the low level at which meaningful integration exists, but it does provide evidence that there is integration above the nation-state level, i.e. within blocs. From this we may legitimately infer a relationship between descending integration and increasing size, which is comparable to the observation made earlier with reference to segmentary lineage systems. Integration "fades out," as it were, as one moves from the state to the bloc subsystem to the global system.

Now let us move from the UN to the international system, of which the UN provides an institutional expression. Conceivably, every state is a participant in many subsystems, be they trading groups or military alliances, and some will be activated by a particular event or sequence of events. In analyzing an event, we must therefore look to the particular set of subsystems it activates and the degree to which they overlap each other. The Indian-Pakistani dispute over Kashmir brought into play a configuration that included India, Britain, and the United States, but a different configuration—India, Bhutan, Sikkim, and Nepal—moved to the fore during the Chinese trans-Himalayan invasion. We might measure the severity of a dispute in terms of the number of subsystems that eventually are drawn into it.

A set of overlapping subsystems is, in fact, simply a source of cross-cutting memberships. If there is an India–Britain–United States subsystem, there is also an India-Soviet subsystem, as well as a subsystem made up of Afro-Asian states. Each has its own values and demands. The more their memberships overlap, the more likely it is that the values and demands will conflict. Paradoxically, however, the conflict will be mitigated by the fact that individual states will be simultaneously committed to incompatible policies, and hence will find it advantageous to bring them down to the lowest common denominator. Such a complex of overlapping subsystems has the effect of increasing cohesion in the group that shares memberships, thus integrating an area that is larger than any one state. The contingencies of international relations frequently render these increases temporary, but they occur sufficiently often to constitute a major feature of international life.

As interaction flows multiply, so do the possibilities for cross-pressures,

because it is out of interaction that subsystems grow. To appreciate this fully, we need only return to the Indian example. During the Hellenistic period the subcontinent was a fully realized international system.[22] It saw itself as the civilized center of an uncivilized world that did not merit the attention of civilized men. The proclivity for seeing one's own society as the center, surrounded by barbarians, also was shared by medieval Europe and ancient China. Before the voyages of discovery, Europe was a complete international system, with its own overlapping subsystems. Only later was Europe itself part of a much larger system.

The tendency at various times and places to identify one's locale with the center of the world is more than ethnocentric conceit, it is a way of pinpointing continuities and discontinuities in the ways peoples interact. Thus the "center of the world" is both a judgment upon the level of civilization enjoyed by others and a factual observation that tells us there is a self-contained, integrated area that is unable or unwilling to maintain contact with others—comparable in its cultural isolation to the Tiv or the Nuer.

Decision-makers, if caught in conflicting allegiances, usually find that a moderate course is desirable. The ties that bound medieval Europe and ancient China and India to their hinterlands were too tenuous to affect policy. Indeed, the absence of interactions made policy unnecessary most of the time. Only with more frequent and reliable contacts did this external environment constitute a limiting condition. Medieval Europe, as far as its rulers were concerned, *was* the world, and the sources of cross-pressures lay in the relationships among Europe's spiritual and temporal princes. Today, Europe belongs to a series of subsystems that link it to other regions.

If integration is related to cross-pressures, it is also related to conflict. But conflict, by the very frequency of its use, has become a "rubber concept," [23] susceptible to whatever meanings suit one's fancy. For our purposes, we presume the following attributes. Conflict occurs between two or more parties [24] (a point hardly worth mentioning if we did not

22. Bozeman, *Politics and Culture,* pp. 118–26, 133.

23. Raymond W. Mack and Richard C. Snyder, "The Analysis of Social Conflict—Toward an Overview and Synthesis," *Journal of Conflict Resolution, 1* (1957), 212–48.

24. North, Koch, and Zinnes, "The Integrative Functions of Conflict."

frequently forget, in our desire to condemn it, that conflict also is a form of interaction). Multiparty conflict occurs, but it is likely eventually to reduce itself to a two-party affair.[25] There are many types of dyadic interaction, but conflict is separable from others by the fact that it involves (1) two mutually incompatible goals [26] and (2) an observable attempt by one party to frustrate the designs of the other.[27]

Conflict is not, as popular fancy would have it, the ultimate form of estrangement, either between persons or between countries. The psychoanalytic dictum that love and hate coexist preserves a vital insight into behavior. It is a truism, but often forgotten, that a conflict cannot be joined unless and until there is some kind of contact between the antagonists. The contact, perforce, is of an unpleasant sort, but it is contact nonetheless. We find it difficult to hate persons who live thousands of miles away, whose activities—in even the remotest sense—do not impinge upon our own. Similarly, we cannot love them, except in the most abstract manner.

Conflict thus represents a choice, available to any person or group, in the way a person or group relates to those with whom a relationship is possible. If conflict is to be the mode of interaction, it can be expressed violently or nonviolently.[28] A state that communicates, by physical violence or by nonviolent symbols, its intentions to frustrate another is entering into an interaction with its foe, not pulling apart from the foe. The diplomatic maneuver of "breaking relations" is illusory and misnamed if it leads to war rather than isolation.

Inasmuch as conflict is a mode of interaction, it is difficult to imagine how a conflict would begin if there had been no preceding interactions. Criminologists tell us we are far more likely to be murdered by a relative or an acquaintance than by a total stranger. Although it is disturbing to think that one is more apt to be done in by an enraged cousin than by an anonymous mugger, there is a sound basis for the conclusion. At the level of states, even the most expansionist countries seek out a traditional

25. Mack and Snyder, "The Analysis of Social Conflict."

26. North, Koch, and Zinnes, "The Integrative Functions of Conflict."

27. Vilhelm Aubert, "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution," *Journal of Conflict Resolution, 7* (1963), 26–42.

28. Howard E. Koch, Jr., Robert C. North, and Dina A. Zinnes, "Some Theoretical Notes on Geography and International Conflict," *Journal of Conflict Resolution, 4* (1960), 4–14.

enemy or a trading partner or a contiguous territory—in any case, a prey with whom it has had links in the past, if only in the immediate past. An incursion of nomadic peoples may bring two societies into sudden and violent opposition, but, had the incursion not taken place, the two would have gone their separate and noninteracting ways.

As long as we do not differentiate conflicts by their intensity, they also may arise from a regular and established web of transactions. Indeed, they may arise from the same group of interactions that contribute to integration, notwithstanding the fact that the outcomes are so apparently different. Contacts between peoples produce cohesiveness if they are distributed so that they create cross-cutting memberships and conflicts, but, at the same time, they may multiply the causes of friction. We tend to overlook the nexus of conflict and integration because the conflicts that occupy cohesive societies are of moderate intensity. Further, because we value cohesiveness above conflict, when cohesiveness is present we are content to ignore its unintended by-products, as long as they do not threaten the system as a whole.

Usually, a point of high transaction tends to be a point of high integration and of frequent but not terribly intense conflict. The more frequently people interact and social events occur, the more likely it is that rules will be broken and that "competing bids" will chase after limited resources. As will become clear later, conflicts at this point not only are more easily begun, they also are more easily managed. At the same time, the legal system is most put upon and most effective. An abundance of face-to-face relationships ensures that the usual human penchant for self-servingness will be activated, but the face-to-face relationships also set the stage for effective order. Again, order and conflict coexist in an interesting and socially desirable paradox. As we moved outward into areas of increased perceived distance from our center, contacts diminished, and with them the excuses for conflicts. In such settings, conflicts rarely begin, but, the evidence tends to show, they are exceedingly intense and exceedingly difficult to de-escalate after they have begun. The legal system is required less, but its capacity is strained in instances that require the legal system. Thus three relationships come into play: between interactions and integration, between interactions and the frequency of conflict, and between perceived distance and the frequency of conflict.

Thus a multicentric society—one that is characterized by dispersion of power to many autonomous groups—consists of zones of integration and

zones of conflict. The implication is that the legal system functions differently in different zones, but before we pursue this point let us examine the distribution of the factors we have been discussing in segmentary lineage systems and international relations.

Earlier sections indicated that the pattern of intergroup conflict in segmentary lineage societies follows the dictates of lineage. In large measure this is true. Fights expand as lineage requires, growing so that the forces arrayed by both sides are approximately equal—equal, that is, in the levels of the lineage chart involved. This process of alliance formation takes place even when the segments that are to form the alliance are locked in feuds. When this occurs the feud is set aside, for the segments recognize that, at a higher level of genealogical abstraction, they are components of a larger segment and must incorporate into it to fight a greater enemy. The enemy, of course, is more distant from the segments in question, both physically and genealogically, than the segments are from each other,[29] notwithstanding personal animosities that seem to stand in the way.

The same idea can be expressed less technically by saying that "if a fight has started or even threatens to start, certain persons are in duty bound to rally to the support of the person already involved." [30] Thus, simply, one aids those to whom one is most closely related in opposing enemies to whom one is less closely related. The symmetrical nature of segmentary genealogy makes for formally equal alignments of forces, and the nested quality of the system means that small groups unite against a larger adversary until genealogically equivalent units are fielded against each other.

In theory, equal is pitted against equal throughout the system.[31] It is possible to see such a society as almost mechanistic in its equilibrium as force pushes against equal force within a symmetrical structure. If, however, we carry the mechanistic analogy too far, we run afoul of the facts, for, to be perfectly consistent, the principle of segmentary opposition (as it is called) should run equally through the entire system. Equal segments at all genealogical levels should be poised against each other, waiting to be activated by a small quarrel. External pressures should push equally

29. Middleton and Taft, "Introduction," in *Tribes without Rulers.*

30. Lucy Mair, *Primitive Government* (Baltimore, Penguin, 1962), p.339.

31. Marshall D. Sahlins, "The Segmentary Lineage: An Organization of Predatory Expansion," *American Anthropologist, 63* (1961), 322–45.

against each and all, until the entire society coheres because of the unwitting connivance of the alien societies that press it along its perimeter.

The data run, however, in a somewhat different direction. Observable hostility, which should be the universal social cement, is differentially distributed. It is greatest at the lowest social levels, between minimal segments, rather than between larger segments and between whole tribes.[32] We need not look far for the source of this inconsistency. The smaller the area of group interaction, the greater the cohesion through the overlapping memberships (as was discussed earlier). By the same token, however, the multiplication of interactions also leads to additional opportunities for disagreements.

Thus the conclusion that hostility is indeed a function of the frequency of contact.[33] Structurally related groups perceive themselves as closely related, a perception that is reinforced by physical and genealogical proximity. Regarding each other as neighbors, they have frequent contacts, made possible by their physical proximity and legitimated by their common descent, a descent not simply through the society's primal ancestor but also through a subsidiary line of descendants of several generations' depth. They can have no comparably close relationships with other segments, for physical distance creates obstacles to free movement and genealogical distance makes it questionable why anyone would take the trouble to establish contacts.

Thus we see that, at the intravillage and intervillage levels, interaction, integration, and conflict perform their anticipated roles in achieving coexistence. Beyond this, despite acknowledged ties of blood that occasionally are actuated by major quarrels, there is progressive estrangement. It could not be otherwise, given the immobility that primitive technology dictates. Of course, this situation must be multiplied countless times to be raised to the level of the entire society: the complex of interactions-integration-conflict is repeated over and over in separate locales. This description receives indirect confirmation from the fact that, although entire segmentary lineage systems are in principle mobilizable, it is an extraordinarily difficult undertaking in practice, depending as much upon the emergence of charismatic leadership as upon the awareness of maximal lineage obligations.

Traditional descriptions of segmentary lineage, therefore, can take us only so far, for they impute a homogeneity that the societies have not in

32. Evans-Pritchard, pp. 149–50.
33. Ibid.

fact attained. The true multicentrism of the Nuer, Tiv, and Tallensi is undisturbed. The likelihood that all segments, or even half of them, will unite in a common defensive enterprise is very remote, but upheavals that involve distant kin have an incendiary quality that makes their infrequency a blessing.

Many of our observations also apply to international relations, once the comparison with primitive societies is regarded as a tool of analysis rather than as a moral judgment. The manifestly incompatible goals that countries seek—whether they claim the same territory or fight for identical shares of world trade—necessarily produce international conflict, even though the expression of the conflict is not always in the form of war. Most international conflicts involve neighbors, often system partners; and most wars are waged between neighbors. Given the relationship between conflict and interaction, wars are not commonly pursued between countries that are total strangers (although the history of imperialism must qualify this statement). In the modal instance, commerce or exchanges in ideas, goods, and persons allows one state to impinge upon another. France and Germany seem to be tied to a common fate much more securely than France and Spain, the latter barred for so long from effective interaction by the Pyrenees. And India and China have led more estranged existences than physical distance alone could produce.

International interactions are, in a way, unbiased. Trade may mutually enrich, but it can also provide excuses for disagreement. International trade negotiations in recent years have proceeded on the assumption that, in principle, international trade is mutually beneficial, but this leaves much room for squabbles over its distribution. Although the "weight" of interactions can regulate the frequency with which conflicts develop, interactions cannot tell us very much about the intensity the conflicts exhibit. Intensity depends, instead, on distribution, on cross-cutting conflicts. One international lawyer has expressed the relationship in this manner: "If a number of different disputes divide the same two nations or the same two groups of nations along a common boundary, the conflict situation becomes aggravated. But if the lines of one conflict cross those of other conflicts, divisions becomes less sharp, people begin to recognize some common interests." [34]

It is perhaps unexceptionable but nonetheless significant that the more

34. Roger Fisher, "Fractionating Conflict," *Daedalus, 93* (1964), 925 f.

complex the web of interactions, the more likely it is the actors will perceive that their fates are interdependent. The Soviet Union and the United States in the mid-1960s offer a good illustration of this. During the classic Cold War period of the '50s, every conceivable international dispute could be, and was, interpreted in terms of the basic and overriding U.S.–U.S.S.R. conflict. During this period, seemingly inevitable conflicts accumulated between these two states. World conflicts in the '60s have a very different distribution. The Soviet Union must contend with independent and self-seeking eastern European allies, in addition to possible assault from China. The United States, preoccupied with the apparent threat of Chinese hegemony in Asia, must simultaneously worry about the divergent foreign policies of its western European allies. The sum total of conflicts may not have changed, but enough conflicts cut across the old U.S.–U.S.S.R. division to make the relationship between the two states one of limited conflict and limited cooperation.

Borders have figured to a disproportionate extent in the genesis of international disputes, so that the illicit crossing of a border is subject to instant magnification as a "dangerous incident." A boundary, as the proclaimed limit of a state's jurisdiction, acts as a trip wire, activating defense mechanisms at a time when they can be of value, despite the limitations nuclear weapons place upon this function. A border also constitutes the farthest reach of a state in the direction of other states or in the direction of a vague *terra incognita.* Two or more states cannot occupy the same land area even though other international actors (such as functionally defined international agencies) can and do. Consequently, contiguous states occupy tangential relationships. As the touching points, borders define interactions, whether these are peaceful or hostile. Borders figure prominently in the lore of international politics because what takes place across them can generate hostility as effectively as community. In a limited number of cases, great pains have been taken to render borders impermeable. The Great Wall of China, the line of defense the Pharaohs set up on their eastern frontier against Semitic nomads, and the present-day Berlin Wall were meant to shut off all interactions. Most boundary situations are involved in such a role; they set the loci of interaction but do not shut out the "barbarian hordes."

Chapter 4 discusses law itself. The first three chapters were an extended prologue that was necessary because it allowed us to specify the setting in

which law works and some of the tasks it must accomplish. Social scientists have taken to using the term "law-jobs" for these tasks; the term may not be particularly felicitous but it focuses attention on the problem-solving nature of law. It also tells us that the problems are not necessarily fully identifiable with "cases" or other institutional measures. Conflicts do not exhaust a specification of law-jobs, but legal systems seem to spend an inordinate amount of time dealing with them. Because the workload of law appears top heavy with conflict management, this chapter has examined the nature and distribution of conflict in detail.

We have seen, for example, that conflict and order arise, in a sense, from the same base. Ordered relationships among segments or states mean that a measure of integration finds them together in a routine manner, and this integration arises from the same matrix of transactions as conflicts. Transactions, in turn, take place between peoples who perceive themselves to be neighbors, regardless of intervening physical distance or the lack of it. Segments and states that have neither common transactions nor common notions of perceived closeness are as unlikely to integrate as they are unlikely to quarrel; they exist in discrete compartments, between which no mode of interaction, amicable or violent, is possible. Again the common characteristic of the primitive and the international is the central point or node from which both integration and conflict decrease as one moves outward. Two seemingly antithetical concepts are bound together.

Whenever groups share a number of common members, these members and the units that contain them will of necessity find themselves allies in some situations and antagonists in others. For example, the feud relationships that divide small groups among the Chiga are counterbalanced by ties of uterine kinship, marriage, and pact-brotherhood that cut across the lines of the feud.[35] The Tallensi exhibit a balance between centrifugal and centripetal forces, and segments seem to balance each other in an equilibrated system.[36] If this is clear in primitive societies, it also is clear in the balance of state and communal interests within international alliances. The deviant ally who insists on going his own way either is forced into a more conformist posture or he brings the behavior of all the pact

35. May Edel, *The Chiga of Western Uganda* (London, Oxford University Press, 1957), p. 8.

36. M. Fortes, "The Political System of the Tallensi of the Northern Territories of the Gold Coast," in M. Fortes and E. E. Evans-Pritchard, eds., *African Political Systems* (London, Oxford University Press, 1963).

members down to a common denominator. Otherwise, some states will gain greatly and others will lose greatly, an imbalance that cannot be indefinitely sustained.[37] Every successful example of international order—from ad hoc alliances to the most carefully constructed "supranational communities"—must be cross-cut by issues and affiliations that force antagonists together and fast friends apart. In this way are disruptive influences neutralized.

Paradox is a category that seems more fitting to theology than to social science; nonetheless, the symbiotic relationship between conflict and order has been widely observed within our own society. Representative democracy, in its essence, is the legitimate expression of a moderate degree of conflict.[38] Unanimity of interest and outlook is compatible with integration only if one postulates an ideal polity that is homogeneous in every respect. In fact, the paradox remains: opposites can unite and conflict can order. This is not to say that opposites frequently do not repel each other nor that conflict does not irreparably divide upon occasion, but properly distributed conflict validates the paradox.

Basically, law is an instrument for social purposes, not a subject for individual study and contemplation. It is a way of accommodating and channeling conflict. The cultivation of interactions produces community and conflict, often within a single, specific situation. It also produces the social supports and the *raison d'être* of law, and it is to these that we now turn.

37. George Liska, *Nations in Alliance* (Baltimore, The Johns Hopkins Press, 1962), p. 114.
38. Lipset, *Political Man,* p. 71.

4. The Social Bases of Law

Law is traditionally, if somewhat uncertainly, divided between "substantive" and "procedural" rules (occasionally referred to as "contentual" and "delegatory").[1] The procedural rules or norms create a framework within which a whole array of human actions can be judged, with the subsequent introduction of substantive rules or norms that outline the permissible and the impermissible in human behavior. Procedural norms can delegate persons in a society to prescribe conduct by conferring discretionary authority on them. In other words, procedural norms answer the question "Who can legitimately make and enforce laws?" Because legislation is a common source of substantive law, procedure comes first in this view. Until it existed, lawmaking was an undefined and illegitimate activity—a consoling thought, even when we know that procedural norms often legitimate lawmakers after the fact.

The continued popularity of the substance-procedure distinction is attested by the work of H. L. A. Hart, although Hart reverses the traditional order. What he calls "primary rules of obligation" come first—theoretically and, presumably, historically. In his scheme of things they correspond closely to traditional notions of substantive law. They tell the individual what he can and cannot do. They are statements about conduct to which obligation attaches, and they may be found even in settings that are devoid of legislators and procedure. Procedure comes along in time, through what Hart calls "secondary rules of recognition, adjudication, and change."[2] Hartian jurisprudence accords to this second layer the familiar functions of determining when an uncertain rule is to be granted the status of law, how laws are to be changed, and how it can be determined that someone has broken the law.

There is no end to the making of such typologies, but all have a common feeling that legal rules are—at the same time—homogeneous and heterogeneous. All typologies of law start with a characteristic that is shared by, let us say, procedural law and substantive law—even Hart's system, which aims at the explication of a "concept" of law rather than a simple "definition." For example, different types of legal rules can be couched in the form "If X, then Y ought to follow." This is not the whole of it, however, for typologies also separate. They tell us that we are not

1. See G. Lowell Field, "Law as an Objective Political Concept," *American Political Science Review, 43* (1949), 229–49.

2. See Hart, *The Concept of Law,* pp. 77–96.

looking at a smooth and uniform phenomenon. Even when they are comparatively unconcerned with the social environment or effects of law, when analysis goes purely to what rules are supposed to do within the system, there is variety and complexity.

It is not difficult to see law as having been superimposed on society in a series of layers. Some norms are widely diffused and universally accepted. Other norms may be subject to much variation, although each variation is combined with related, universally diffused norms. Taken from this abstract form, the United States has such a system. Federal, state, and local laws combine, like so many plastic overlays on a political map of the country. A dazzling complexity is thereby introduced, but New Yorkers, for example, go about their daily business oblivious of the 1,400 layered governmental units that rule them.

The American legal system, in principle if not in practice, is susceptible to a degree of harmonization. The recognized hierarchy of norms, descending from the Constitution to the lowliest ordinance, and the parallel institutional hierarchies of legislatures and courts bring coordination within grasp. Segmentary and international legal systems have never possessed the advantages that might accrue from these mechanisms, and therefore it is necessary to take their layered and heterogeneous rules with even greater seriousness. In short, law is not simple and uniform, present or absent. The manifold guises of law suggest that it may be fruitless to search for a social litmus test for its presence, an endeavor that has been carried on for centuries with negligible results. The most prevalent and influential attempt was the command theory of law.

The command theory distinguishes law from other modes of social control solely by its ability to use or threaten to use centralized and legitimate physical coercion to secure obedience. We have already touched upon its widespread acceptance, but, this acceptance notwithstanding, severe logical and empirical difficulties militate against it and seem seriously to outweigh its cardinal virtue, simplicity. Physical coercion, of course, can be a powerful force for controlling human behavior, and in specific situations it seems—and indeed is—paramount. But a careful examination of its very real limitations demonstrates that it is of much greater significance as a short-term expedient rather than as the foundation of a legal system. This question must necessarily be dealt with in the context of stateless societies, if for no other reason than their manifest inability to organize sanctions in the conventional sense. The demotion of physical coercion to

subordinate status, however, must have profound effects on our understanding of law in the larger perspectives of both developed and primitive societies.

Physical sanctions are conditioned by three considerations: scarcity of resources in all societies, failure to consider the problem-solving character of political systems, and evidence on the genesis of norms. Whether we choose to use "law" or "command" or "norm" or "rule," none of these terms is conceivable without the possibility of disobedience.[3] The ability to deviate from norms distinguishes human law from the laws of science, which seek to present complete descriptions of the world.[4] Sanctions would not be deemed necessary if everyone hewed to the straight and narrow path because of innate good sense. But, as Madison said, men are not angels; and the rules of all legal systems, whether generated by consensus of the mass or by the whims of an elite, anticipate their trangression. Presumably, if this possibility did not exist, the rules might never have been enunciated.

Departures from the rules are supposed to be signaled by disobedience, and the use of sanctions is predicated upon the belief that only a minority, and a *small* minority, will be involved in lawbreaking. Every act of enforcement represents a decision about how a society wishes to spend its resources, and, because its resources always are limited, these decisions usually are made with care. It would be self-defeating to pour a society's wealth into the punishment, correction, and deterrence of deviation if, as a result, other systemically essential activities had to be curtailed. (The proportion of police per one thousand persons is higher in South Africa than in the United States, but not high enough to depress the standard of living of the white minority.) Only a limited amount of effort can be put into marshaling physical coercion; it is only one task among many that cry out for priority.

This limitation on the police function can be dealt with in two ways. First, some rules may be enforced with greater regularity than others. As far as we know, no one has taken all the statute laws of a state and made an inventory of "dead letter" laws, or laws enforced only occasionally, or laws enforced only against particular subclasses of offenders. One of the

3. Charles Boasson, *Sociological Aspects of Law and International Adjustment* (Amsterdam, North-Holland Publishing Co., 1950), p. 15.

4. John Kemeny, *A Philosopher Looks at Science* (Princeton, Van Nostrand, 1959), pp. 36–41.

most common criticisms of metropolitan police forces is that some laws are enforced principally against Negro offenders. A police force, unable to enforce all laws at all times, may choose (for complex reasons) to concentrate on race as a criterion rather than upon a random procedure. The outcome, although unpleasant to contemplate, results from the limits under which sanctioning apparatuses operate.

If "selective enforcement" is one accommodation that states make because of their limited resources, the second accommodation is the assumption that offenses are staggered through time. The legal system can be looked at as an analogue of a bank that never carries enough cash to meet all of its demand obligations.[5] The belief is that total withdrawal will not occur in a short period of time, and the experience of bankers demonstrates that most of the time this is a safe assumption. Governments, likewise, have more rules on the law books than they could enforce if all rules were broken simultaneously, or if everyone broke only one rule at the same time, or if another unlikely instance of mass disobedience occurred. Like runs on banks, runs on the capacity of enforcement also occur, however infrequently. The Prohibition experience, the snail's pace of school desegregation, and large-scale riots are examples of the unlikely occurring. The assumption of only small-scale disobedience, which underlies small police forces, works fairly well. For our purposes, it is important to note that behind the façade of enforcement is the implicit assumption of consensus or acquiescence. Instances of wholesale deviation and the consequent imposition of wholesale sanctions conjure up not the image of a zealous police force but an army of occupation. Efforts to enforce rules on a hostile population constitute external conquest and occupation, not normal law enforcement. Dictatorships, although they seem to be exceptions, are well within the framework of the discussion thus far; they require a high degree of public apathy (e.g. Haiti) or a high degree of public support (e.g. Nazi Germany). Such apathy is less often the product of repression than of a tradition of low political interest and participation.

It also has been asserted that sanctions, real or threatened, have a deterrent effect, although this is one of the great unexamined premises of legal theory.[6] The evidence, such as it is, is equivocal, but it seems to

5. Karl W. Deutsch, *The Nerves of Government* (New York, The Free Press, 1963), p. 121.

6. Arthur Larson, *The International Rule of Law* (New York, The Institute for International Order, 1961), p. 66.

point toward the ineffectiveness of various forms of deterrence. The basis for deterrence is the unassailable premise that we learn not only from our own experience but from what we see is the fate of others. Most of the large-scale research in this area has been directed not at the theoretical point but at the narrow policy aspect of the sentencing procedure, for example, at the efficacy of capital punishment as a deterrent for homicide. Evidence for the United States clearly shows that over the long run the death penalty has no significant effect either on the homicide rate in general or on the rate of killing of police officers.[7]

Clearly, deterrence from major crime is not meant to apply to the majority of citizens, who by no reasonable stretch of the imagination are secret felons pressing against the law's restraints. Deterrence is directed at the minority, at potential law violators. An adequate research design, moreover, would have to separate real deterrence from the appearance of deterrence, for obedience is not in itself testimony to the effectiveness of penal laws. The obedient citizen may be only a well-socialized citizen. His apparent fear of punishment may in reality be a sense of obligation that was instilled through the combined socializing agencies of family, church, school, and peer group.

To these limitations must be added the fact that politico-legal systems are problem-solving systems. Demands are made upon them, not least of which is the demand for order. In a real sense, then, every legal system provides services for its subjects-clients. At a later point we shall examine in considerable detail the demonstrated human need for a stable social environment, but now we will say only that this need is usually transmitted to the legal system. Its fulfillment means that the legal system has added to the well-being of those over whom it has jurisdiction. To some degree, then—however small—more has been done than merely imposing rules upon a recalcitrant population. Stability has been attained, and those to whom this is a good in itself (or a means to a higher end) constitute a source of social support for the law.

We also know that norms and sanctions are not inseparable. Norms—patterns of conduct regarded as binding—are found in the most diverse private situations, beyond the reach of the law. (We shall again have occasion to refer to the norm-generating potentialities of *all* social situations,

7. Thorsten Sellin, "The Death Penalty, A Report for the Model Penal Code," in Richard C. Donnelly, Joseph Goldstein, and Richard D. Schwartz, eds., *Criminal Law* (New York, The Free Press, 1962), pp. 342 ff.

if they are sufficiently prolonged.) Norms, the evidence indicates, precede rather than follow the means for their enforcement, suggesting that enforcement is a later refinement and is not essential for the existence of a legal system. If this is true, the importance of this conclusion for stateless societies is obvious.

The state, in the widely accepted view of Max Weber, holds a monopoly over the legitimate use of force in a territory. The state is recognized, in some rightful way, as the ultimate repository of a society's most extreme sanctions. The essential element of legitimacy enters into all concepts of legal sanctions. In other words, even the command theorists concede that the mere possession and use of instrumentalities of coercion are insufficient unless laws are grounded on broad social acceptance. Sanctions may at first be administered with apparent caprice, only to be legitimated through usage and through connection with legitimating symbols. The expansion of royal justice in England tampered with ancient local prerogatives, but a combination of kingly persistence and the residual prestige of the crown allowed centralized justice to prevail. An instance such as this partakes of the general norm-building process, which is in no way surprising in view of the fact that the application of a sanction is itself procedural.

In summary, then, the utilization of coercive sanctions is hemmed in by limitations: by the insufficiency of resources, the ambiguous relationship with deterrence, the importance of socialization, the antecedent character of the norms, and by the minority character of deviance. Coercive sanctions, which come into play in a statistically small percentage of the events that make up social life, depend upon the prior existence of procedural norms that govern their applicability.

Two important consequences follow from these considerations. First, coercive sanctions need not be the mainstay of law inasmuch as the vast number of social interactions seems never to invoke them or to be due to their presence. To limit law solely to instances in which sanctions are applied (a not uncommon approach) is to reduce it to social pathology. Second, the procedural consensus upon which sanctions are based is perceived to be ideologically and perhaps temporally prior to the use of force.

These factors weigh heavily in an analysis of developed vertical legal systems in which sanctions often appear central. Our reservations about the primacy of sanctions in this connection will have repercussions in the

study of law in stateless societies because they undercut the traditional contention that stateless societies operate not by law but by "custom" or "social control." But the diminished status of coercion suggests that even the most rigorously unincentric society must contribute other than coercive supports to its legal system. It suggests, further, that noncoercive, consensus-based supports may be the key to understanding horizontal legal systems in which physical sanctions are, for the most part, structurally impracticable.

If horizontal law (and, inferentially, some aspects of vertical law) is not grounded upon the police power of the state, what is its foundation? This is simply another way of asking how an observer can tell where one legal system ends and another begins. If there are no acts of enforcement to observe and no patterns of coercive response to putative rule-breakers, where is the guide to the legal boundaries? Just as law without the possibility of disobedience is absurd, law without the prior existence of conflict is superfluous. If there were no conflict it is very likely there would be no law. Again: If men were angels. . . .

The absence of conflicts, if for the moment we assume this possibility, presupposes that needs, interests, and goals on the one hand and the means wholly to satisfy them on the other hand are always in total agreement. But we have seen the empirical impossibility of such an Edenic correlation. As far as man's experience is a guide, conflict is a necessary precondition for law, although we must recognize that such an observation rests upon logic rather than upon examination of a conflict-free society. When we take for granted the necessary role conflict plays in the emergence of law, we also assume that conflict is merely necessary and is not sufficient in itself.

The truth of this assertion becomes clearer after we analyze a concept developed by anthropologists to aid in the mapping of legal systems. It is called "jural community" and it is, in effect, the legal counterpart of the more common term "polity." But there is an essential difference. Most writers are content to talk about polities but seldom do they define the word in an operational sense, providing guides for observers who wish to use it in the field. Jural community, however, is a creation of ethnographers who are deeply aware of the difficulties in drawing boundaries around societies that manifestly are poor in institutional structures. How, then, might one go about determining the outer reaches of a primitive le-

gal system without seeming to be wholly arbitrary? The jural community (to begin at a high level of abstraction and work downward) is the legally relevant social grouping. At this level of generality there is no reason why the concept, although anthropologically generated, could not be of comparable value in the study of international law. Indeed, as we consider this in detail, it will become clear that, in the concept of jural community, there is a powerful analytic tool that contributes to an understanding of all legal systems, but especially of horizontal legal systems. The latter, lacking clearly defined legal institutions and possessed of a fluid role structure, cannot be defined, as it were, in their own terms. Even if this were possible, such a research strategy might not be desirable.

In a homelier example than ethnography provides, the confines of the American federal legal system could, in principle, be ascertained by a careful check upon the movements of its law officers and police, the personnel of the departments of Justice and the Treasury, the military police and the military attorneys, the members of the federal judiciary and their administrative subordinates, and so forth; but even this brief exposition demonstrates the embarrassment of riches that confronts students of the American judicial process. The circumscribed functions of legal personnel in stateless societies make this kind of mapping exercise hopelessly misleading. The crucial transactions of public international law need never pass through the hands of advocates before the World Court or even through the legal advisers of foreign ministries. The ritual mediators of tribal law have their place, but much of the legal business, as it were, passes easily—and frequently—around them.

How can we draw the boundaries of the jural community? And can we draw the boundaries without becoming prematurely committed to a particular concept of law? The answer to the second question is bound to appear equivocal. On the one hand, how can the legally relevant community be distinguished without a clear concept of law? On the other hand, would not a sufficiently general index of jural community permit competing conceptualizations of law?

For the moment, the choice of a boundary criterion is dictated by the necessity that it be applicable both to segmentary societies and to international relations. Fortunately or unfortunately, this provides no *deus ex machina* solution. Knowing where the legal system begins and ends tells us much less than ideally we need to know—in the same way that the specification of political boundaries between states tells us much less

about their politics than we desire to know. There is, of course, much that political boundaries can reveal, for we can thereby infer some of the characteristics of states, both in their internal centralization and in their relationships with each other.[8] But if all of the hidden qualities of politics inhered in boundaries, political scientists would have to go no farther than an atlas to solve their problems. The limitations in all boundary criteria notwithstanding (e.g. between settled and nomadic societies), there are immense variations within the constraints. Democracy and dictatorship and monarchy and oligarchy thrive equally in bounded states. It is just as probable, moreover, that legal systems are subject to a comparably wide range of variations within boundaries that are established by jural community.

"Jural community" grew out of the study of segmentary lineage systems. It was originally taken to be "the widest grouping within which there are a moral obligation and a means ultimately to settle disputes peaceably." [9] It need not have the fixed size that political boundaries require; it may vary over time, depending upon the distribution of conflicts. Nor does the jural community need a uniform "span" throughout the society. Over and above the society-wide procedural consensus, that is, there may be additional consensus on additional norms in smaller sections. An added refinement (by way of operationalizing) makes a jural community the area within which compensation *may* be paid in cases of homicide, regardless of the frequency with which it is in fact paid.[10]

Although the jural community encompasses an area of common conflict-management devices, the devices in no way preclude sharp conflicts. Usually, intensity increases when a means of conflict management is not commonly accepted by the parties. Within the primitive context, disputes within the jural community can escalate to feuds, and disputes between jural communities can expand to wars.[11] Feuds, if governed by kin rules, subject related groups to severe conflict, while isolating the general society from destruction.

It is difficult, of course, to ascertain the scope of "moral obligation." In principle amenable to attitude surveys, ethnographers usually have dealt in

8. William D. Coplin, "International Law and Assumptions about the State System," *World Politics, 17* (1965), 615–34.

9. Middleton and Tait, "Introduction," in *Tribes without Rulers,* pp. 1–32.

10. Robert A. Le Vine, "Anthropology and the Study of Conflict: Introduction," *Journal of Conflict Resolution, 5* (1961), 3–15.

11. Middleton and Tait, "Introduction," in *Tribes without Rulers.*

less formal and systematic interview techniques. Nonetheless, what they have produced is all that we may reasonably expect to learn about these societies; so we must make do with their assertions that large numbers of people over a large area will respond similarly when asked whether they feel obligated to use, let us say, the Nuer leopard-skin chief as a mediator. It is less difficult, however, to determine whether the means for conflict management exist. The observation of mediators and negotiations, plus the combined memories of informants (all, of course, nonliterate peoples), combine to offer some fairly reliable answers. The specification of compensation for homicide sidesteps the intricate question of obligation and falls within the kinds of data that are most easily available: observation and recollection. The testimony of social anthropology seems clear: Despite the absence of courts and lines of jurisdiction, it is possible to say that there are traceable areas of common procedure. The procedure may be no more than an "instinctive" obligation to "talk it over," but, in the absence of more structured means, this obligation looms large. The practice of paying the kin of a murder victim a specified number of cattle is similarly significant.

On the international level, much of the copious literature of international law codifies procedural similarities. These efforts have suffered a measure of distortion due to the prevalent belief that international law must be *globally* valid—the sharing of norms across state boundaries is not enough. Obvious cultural differences intervene, however. It is easy to see the route the belief in universal law has taken. Combination of the Roman *jus gentium* (the lowest common denominator for commercial practices between Romans and non-Romans in the empire) and the Stoic-derived *jus naturale* made it seem obvious that, at bottom, there was one world law. Natural law made human reason the source of norms. If human reason discovered them, identical norms should appear wherever people lived. Every place in the "known world" conformed to the *jus gentium,* which had been derived from an inventory of common customs. Therefore, the syllogism concluded, the *jus gentium* must be coextensive with natural law. Thus it was that a branch of Roman law, the *jus gentium* (usually translated "the law of nations"), came to be regarded as the law of all mankind. Even where this process of identification was not strictly followed, the belief was firmly embedded in international law that its province was truly global.

There was a strong element of political truth in this, as long as the tide

of European power ran strong. Western origins mattered little when Western power asserted itself over the non-Western world; and it seemed that international law was worldwide. Now that the old colonial empires have shattered, *non*-Western cultural influences have come to the fore. The world is not a one-law world, fervent wishes to the contrary notwithstanding; it is a world of "diverse public orders." [12] There was no boundary problem for international law in the past, except, perhaps, the dubious boundary between "civilization" and "barbarism." Now there are very real boundaries to be considered. Little has been done in the closely related task of categorizing municipal legal systems, but a few attempts have been made to map law-areas directly (sections of the earth's surface that are characterized by similar normative systems). It is logical to suppose that broad differences at this level also must exert an influence on norms *between* states.

In 1928, John Henry Wigmore offered a tenfold legal typology: Anglican (English), Chinese, Germanic, Hindu, Japanese, Mohammedan, Romanesque, Slavic, Soviet Slavic, and Tribal Customary (the last a residual category for primitive law).[13] Adda B. Bozeman, writing thirty-one years later, offered Western, Byzantine, Islamic, Indian, and Chinese.[14] More recently, *A Cross-Polity Survey* employed the following categories for nonprimitive systems: common law, civil law, Muslim, Scandinavian, and Communist.[15] The overlaps among these typologies suggest the validity of maintaining the distinction between global international law (real and desired) and international law at the level of subsystems (the latter distinguished only by its multistate nature).

The norms of diplomatic practice are an example of the former; the specific economic regulatory procedures of the European Common Market are an example of the latter. Again, the wide dispersal of the contract principle makes it a candidate for global legal status,[16] and specific crim-

12. See Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," *American Journal of International Law, 53* (1959), 1–29.

13. *A Panorama of the World's Legal Systems* (St. Paul, West, 1928).

14. "Representative Systems of Public Order Today," in *Proceedings of the American Society of International Law* (Washington, D.C., 1959), pp. 10–21.

15. See Arthur S. Banks and Robert B. Textor, *A Cross-Polity Survey* (Cambridge, The M.I.T. Press, 1963), pp. 115–17.

16. F. S. C. Northrop, *Philosophical Anthropology and Practical Politics* (New York, Macmillan, 1960), pp. 325 f.

inal-trial guarantees tie together the states of the North Atlantic area.[17] In a sense, then, many multistate areas share procedural and substantive rules. In other words, there are many international jural communities.

A map is a representation of the "real world." In the process of mapping a series of abstractions take place after which some details are ignored and others are made prominent, according to a set of criteria. A scientific model is simply a particular type or class of map. The map with which we are most familiar is, of course, a map of the earth, which may detail the outlines of land forms and such gross topographic features as lakes, rivers, and mountains. It is an abstraction of an idealized perfect aerial photograph. Another type, just as familiar, shows the boundary lines that separate states, and this can be called a formal-legal map because it shows the recognized politico-legal lines of demarcation. It makes no pretense of showing what people do nor does it present the qualitative or quantitative aspects of international relations—although, as we have seen, some of these things can be inferred from such a map.

The mapping that jural community demands represents the data of human behavior. We have seen that primitive and international systems contain areas within which there are common procedures and common symbols through which these procedures are expressed. Jural communities tend to follow the broad outlines of cultures, and we find unexceptionable the notion that peoples who interact freely with one another will develop similar outlooks. Because no one has even attempted the ambitious task of fully tracing the procedural similarities that exist between states, our belief in procedural similarities within the United States grows more from a priori than from empirical grounds. Granted the fragmentary nature of the data, the continued existence of segmentary lineage systems and regular international relations would seem, of necessity, to require a device for handling disagreements. We recognize the need for jural communities before we are able to establish their boundaries definitively.

We have already seen that societies also can be mapped in transactional terms, through the movements of goods, persons, and messages. The ethnographer of primitive societies proceeds from a state of acknowledged ignorance and explicitly recognized cultural bias, but his counterpart in

17. See Deutsch et al., *Political Community and the North Atlantic Area* (Princeton, Princeton University Press, 1957), pp. 127 f.

international relations has greater difficulty in setting aside learned attitudes and images, for these result from having lived in the environment he wishes to study. Just as an anthropologist is interested in more than the distribution of populations over a territory, the ethnographer of international relations must seek representations of his subject matter that account for more than formal-legal boundaries.

With this firmly in mind, let us now define "jural community" as an area in which all the actors recognize that a common method exists for resolving disputes between them. This definition dispenses with Middleton's and Tait's qualifier, "peaceably," because many aspects of American law —let alone stateless law—contain heavy admixtures of conflict. The adversary system, for example, has deep, conflict-laden origins.[18] Primitive systems have complete repertoires of permitted rebellions, ordeals, and feuds, just as international relations have barely distinguishable wars, police actions, civil wars, and *coups d'état.* Our definition also omits considerations of obligation, not because it is unimportant but because it is so difficult to get at. ("Obligation" has been a potent concept in legal and in political philosophy, but, on the whole, it is easier to treat as part of our discussion of norms, in a later chapter.) Jural community, then, need not entail acceptance of a particular concept of law. Within the conventional usage of the terms, it allows for no distinction among "law," "custom," "etiquette," and "morals." (The rationale for maintaining the distinctions is another matter.) In any event, there is no chance for the premature foreclosures of meaning that often plague the social sciences. "Jural community" merely bounds the arena within which the concepts may be operative.

Chapter 3 also dealt in detail with boundary considerations, albeit of another kind. Its emphases were on the loci of conflict and integration, and the significance of that discussion becomes clearer when it is juxtaposed with the concept of jural community. We have seen that the smaller a society the more likely it is to be homogeneous and nonpluralistic.[19] Cohesion results from maximal identity of goals. When units are added, integration ceases to result from simple agreement among the likeminded;

18. See Johan Huizinga, *Homo Ludens* (London, Routledge and Kegan Paul, 1949), pp. 76–79.

19. Bernard Berelson and Gary Steiner, *Human Behavior, An Inventory of Scientific Findings* (New York, Harcourt, Brace, and World, 1964), p. 558.

instead, it becomes a function of interactions. Ultimately, interactions produce integration, when they cause cross-pressures. The result of a full-blown set of cross-cutting allegiances would be that no possible pair of units within a system could be either complete enemies or complete allies.

When cross-pressures and integration were related to segmentary and international societies, we found that they are greatest where interaction is most frequent. Persons who interact frequently perceive themselves as close to one another—not simply in physical proximity but in perceived proximity as well. The net result is that, as one moves from a point of high-frequency interactions, three factors simultaneously decline in magnitude: cross-pressures, perceived proximity, and integration.

To these three factors we add a fourth: frequency of conflict. We have seen that the multiplication of human contacts means the multiplication of opportunities to disagree; only the hermit avoids social conflict. Conflict per se is a way in which interaction is expressed, and the former requires at least enough closeness to allow for interaction. One caveat: Up to this point we have been concerned with the *frequency* of conflict more than with its *intensity*. Perceived proximity, then, begets conflict, for interactions beget conflict and are an expression of conflict. The more frequently all interactions occur, the more likely it is that conflict interactions will occur. This conclusion is partially borne out by the fact that the more complex a society is, the more complex its legal institutions.[20]

It is in a way simplistic to speak simply of "conflicts," which differ markedly in the extent to which they engage the emotions. Consensus for subduing some conflicts is not present to manage others. Is there not, perhaps, an indefinite number of jural communities, not simply globally but in a single integrated area? No doubt there are many, even in legal systems such as our own, in which some norms are given much greater national acceptance than others. The respective spans and depths of co-extensive jural communities are important questions and well worth investigating.

For this very reason it is well that we pin down, with even greater precision, the concept of jural community we have employed. For simplicity we may speak of a *single* relevant jural community, the possibility that it may turn out to be multiple notwithstanding. What is of importance here is

20. Richard D. Schwartz and James C. Miller, "Legal Evolution and Societal Complexity," *American Journal of Sociology, 70* (1964), 159–69.

not establishing the number of jural communities that coexist but establishing the existence of at least one. A jural community connotes a consensus on conflict-management procedures, and, building on this base, it can resolve *some* conflicts. If others cannot be resolved, it is unfortunate, but, according to the limitations set in the beginning, order and justice *for the purposes of this inquiry* must be allowed to go their separate ways.

It was pointed out earlier that jural community is a kind of counterpart to polity; it also is very close to what the contemporary political scientist means by "political community." As political scientists have moved ahead in their investigations of integration and the social context of political institutions, "political community," for all its inherent ambiguity, has exercised a powerful attraction. David Easton's definition of the term will seem familiar to us because it includes many of the elements we discussed earlier in a legal context: self-identification with a collectivity, agreement that differences be regulated by binding decisions, and the availability of norms and structures through which these decisions can be made.[21]

There is, nonetheless, a subtle distinction between Easton and the ethnographers of jural community: between the subjective feeling of obligation and the identification of the procedures that are the object of obligation. In a sense, legal analysis seems in the end to turn inward, seeking the roots of law first in the community but ultimately in the individual. As a whole, political science has always been more concerned with the larger framework in which the individual moves, with shapes and changes in institutions and basic governmental structures. It is well to keep this distinction in mind, for the closer we proceed toward a specification of "law" the sharper we shall focus on cognitive processes that link the individual and his social universe.

In summary, two interlocking ideas draw together what has been said thus far and a third idea indicates our future direction.

1. Conflicts cannot be effectively managed in the absence of jural community. Ultimately, conflict management depends upon social agreement upon the procedures involved.

2. Five boundaries have proved to be coextensive: perceived proximity, cross-pressures, integration, frequency of conflict, and the presence of jural community.

21. David Easton, "Political Anthropology," in Bernard Siegel, ed., *Biennial Review of Anthropology, 1959* (Stanford, Stanford University Press, 1959).

Upon this structure, complex though it already appears, it is necessary to erect yet another stage.

3. Jural community can be identified more explicitly than has been done heretofore if we search for areas that embrace a common set of action-guiding symbols.

The third proposition entails a word of explanation, for its invocation of symbols of reality gives every indication of repudiating rather than building upon what went before. In fact, however, the intricate structure that relates integration and consensus to law is not really so far afield. "Perceived proximity"—that ideas of closeness are often more important to individuals than mere physical closeness—suggest that the "real world" in which law operates exists only in the interlocking perceptions of individuals. Perceptions and the symbols that are used to express perceptions arise naturally from the interplay of human lives rather than from a self-contained, irrelevant world of pure speculation.

5. Law and Perception

Traditionally, when someone studied law he studied books, which told him what others had said about the law and also what the law "itself" said. Langdell's introduction of the case method was regarded as a great advance because it brought the student one step closer to the stuff of life, but of course there still was the danger that cases could constitute the elements of a new scholasticism. Later it became common, first in municipal and then in international law, to disparage the narrow study of authoritative texts. How do we know they are authoritative, other than through the direct tests of experience? The foregoing chapters were in large part based upon critiques of legal bookishness and upon the desire to reach beyond the written word to the observable act. This point of view is good and healthy, as far as it goes.

Life and law must conjoin if the latter is to preserve any meaning or utility. Also, we live in a time and in a society that pride themselves on seeking and accepting the tests of the senses. It is, however, necessary to point out that the old concept of law as a body of book learning was not wholly valueless, for we also accept the belief (or at any rate render lip service to it) that ideas have consequences, observable behavioral consequences. What is said, written, and believed can influence what is done. Once we look to the social efficacy of intellectual enterprises, book learning is seen in a new light. Although exclusive concentration upon the legal corpus—or upon any other literature—can blind us to the larger world, literatures nevertheless have the power to disclose and illuminate sources of action.

Let us, for the moment, find an example in American law, which is now recognized to be more than the sum total of its written rules and their commentaries. It is fashionable to talk in terms of "the legal system," which comprehends courts and judges, law schools, the community of practitioners, police, legislators, administrators, and actual or potential law violators—in short, all the flesh-and-blood individuals whose actions were long overlooked in favor of the dissection of concepts and opinions. The same kind of reorientation toward the larger social picture also can be made for international law. As for primitive law (except for the empirical commitment of the anthropologist), we may well read the rules of, say, Nuer law in the same disembodied fashion in which the Roman law was once studied.

We have thus far been principally concerned with depicting the broad organizational patterns of international and primitive societies and with

investigating the ways in which each achieves its coherence and, in the very broadest sense, its orderliness. Inevitably, such a discussion was far removed from the venerable analysis of respected and official texts, but it is now time to move in precisely that direction so that we can establish the points of contact between the new orientation to law-in-society and the traditional concentration upon law as a set of concepts and ideas. This is of particular importance for stateless societies because we cannot assume that intervening institutions, such as courts and police, provide the links between ideas and actions. We must, instead, infer that the words of the law can be directly translated into observable behavioral patterns. This is neither a small nor an easy inference, but, in societies so bereft of the usual institutional apparatus, this is the only way to demonstrate the relevance of legal rules to everyday life. Because we cannot look at the operations of courts and police, we must of necessity take an indirect route to determine how the ideas of the law (what used to be meant by "the law") can exercise a considerable and sometimes decisive influence on the decisions of individuals and groups.

A jural community, when one is identified, expresses regularities in the way conflicts are handled. *Lord of the Flies,* William Golding's parable of society's origins, presents a generally morbid picture of social degeneration and describes the new order that grows out of disintegration—an order that is not pleasant to contemplate nor one in which most of us would wish to live. The new order expresses the fragility of many norms that are taken for granted. But it is order of a kind, if we assume, as we have, the analytic disjuncture of order and justice, the fact that law can produce results that by some standard or other are unjust. An ethnographer, having visited and somehow survived the puerile society of the shipwrecked youths, would tell us that, however barbaric the methods, order was maintained. There was jural community. In the same way, an ethnographer who could penetrate the texts would tell us that England before the common law was a patchwork of different jural communities, and some differed substantially from others in their stubborn adherence to local variations. In contemporary terms, either a hierarchy of negotiations or a succession of strikes marks off one labor-management jural community from another.

In each case, one or more key procedural norms—*how* things are to be done—sets the jural community apart. To know where a jural community

exists, we must know what a norm is, what functions it performs, and how acceptance of a norm ties individual and social processes together. The jural community is a collectivity; a segmentary lineage system and international relations are collectivities of collectivities. Is this, then, simply an attempt to reduce groups to their constituent members, in the hope that we can explain the whole from the parts? Legal tasks—"law-jobs," as some social scientists refer to them—necessarily devolve upon individuals. Ultimately, the law-abidingness of a group is explicable only in terms of the specific decisions of individual persons on the desirability and/or possibility of disobeying. Obligation, again, flows from subjective feelings of "oughtness." When a group acts in a particular way it is because its decision-makers have acted in its name, or because all or most of its members have shared attitudes. Within the context of horizontal/multicentric legal systems we do not have the opportunity to look for sources of coercion that might account for conformity; we must look to less conventional, individually located factors.

Traditionally, the psychology of perception has not been considered to have much legal import. Legal theory usually has managed—and, legal theorists will argue, has managed well—without it. Only in a few bizarre instances, as when radically different cultures clash, must it be invoked. But there is no reason, save tradition, why such neglect should be maintained. Law, whatever is deemed to lie behind it, is recognized as profoundly involving the way a society is organized. Until recently, political scientists devoted their energies to describing political systems through exegeses of legal documents; although the incompleteness of this technique is now recognized, it was based upon a sound intuition. Unlike laws of science, laws of permissible and impermissible behavior are not the constructions of outside observers but are still the self-consciously applied instruments of the society. Thus what may seem far removed from law ultimately is found at its very doorstep. The stuff of law is the way it structures and deals with disputes, and this in turn results from the way law compels us to look at the world. We are already beginning to see that judges and laymen think differently, that legal training imparts a distinctive way of approaching problems.[1] Primitive and international law, although they lack in greater or less degree a complex mechanism of profes-

1. See Theodore L. Becker, *Political Behavioralism and Modern Jurisprudence* (Chicago, Rand McNally, 1964).

sionalization, nevertheless impose a characteristic picture of reality upon their subjects.

Everyone, by virtue of his human nature, is bombarded by messages from the surrounding environment. Our senses at times reel under the onslaught of stimuli. Stimuli vary in intensity, duration, and locus, but, taken together, they present a workload that is greater than our sense organs and nervous systems can absorb. Except in the most contrived laboratory situations of sensory deprivation, there is a potential surfeit of stimulation, which must somehow be made manageable. The world that impinges upon us does not do so in prepackaged form; it must, instead, be made manageable through a complex and unconscious editing process. Information theory speaks of this process as "encoding," the act of reducing the informational glut to a humanly acceptable level.[2] This is accomplished, first, by limiting the light waves, sound waves, etc., that our perceptual machinery lets through, and, second, by classifying the surviving portion into humanly meaningful categories.

We do not confront an ordered environment; rather, we impose order upon it by innate and learned processes. Our actions respond to patterns of stimuli we have discerned (or imposed) on the world outside ourselves (the familiar philosophical problem this poses need not concern us here).[3] Decisions, therefore—choices between alternatives—are ways of connecting with the environment, ways of using information. There is, unfortunately, no dearth of seemingly uninformed decisions, but they are uninformed only in a relative sense. There might have been more complete or accurate information, ensuring a closer correlation between aims and accomplishments, but surely there is some information. Inquiry into perception, consequently, is a necessary consideration in any analysis of decision-making.

The mind, in its task of editing, combining, and recombining stimuli, groups various stimuli in separate categories of phenomena.[4] We perceive

2. Fritz Heider, "Perceiving the Other Person," in Renato Tagiuri and Luigi Petrullo, eds., *Person Perception and Interpersonal Behavior* (Stanford, Stanford University Press, 1958), pp. 22–26.

3. Charles Osgood, ed., and Thomas A. Sebeok, assoc. ed., *Psycholinguistics: A Survey of Theory and Research Problems* (Baltimore, Waverly, 1954), p. 51.

4. Ward Hunt Goodenough, *Cooperation in Change* (New York, Russell Sage Foundation, 1963), p. 147.

two entities as chairs not because they are conveniently labeled but because the learned configuration "chair" allows us to perform an act of abstraction and group them together. That one happens to be a Duncan Phyfe and the other an Eames is merely testimony to the power of abstraction. The terms assigned to these categories have differed; sometimes they are referred to as "percepts," [5] sometimes as "configurations." [6] We shall employ the term "perceptual categories" to indicate the mind's pigeonholes into which stimuli are sorted for purposes of present meaning and future retrieval. Without "perceptual categories," individuals could have no hope of understanding, much less controlling, their physical or their social environments. Indeed, there would be no social environment, so much does meaningful action depend upon patterning. The world does not orient us, we orient ourselves in the world. If we did not have a coherent, internally consistent system of knowing, we could not erect an internal world of feelings and an external realm of people and things.[7]

Every individual and every group of individuals necessarily possesses these perceptual categories. Indeed, groups often are differentiated from each other through the distinctiveness of their perceptual categories, and often this is what is meant by cultural differences. The phenomenal world is grasped through patterning, through the search for the imposition of regularity. This process is so much a part of the discovery and socialization that goes on in our earliest years, and so much a precondition for meaningful activty, that all too often it goes unnoticed. And the obvious, no matter how important, all too often is equated with the irrelevant. The management of conflict and the role of law are our twin concerns, and we shall see that law lies as it were, in the eye of the beholder. "Conflict situations" can seem cut and dried to the outsider but it is quite a different matter when they are viewed from the perspective of the antagonists. To the disciplined eye of the external observer, therefore, must be added a recognition of the participants' view and the factors they see that might cause them to alter their courses of action.

How do perceptual categories help us understand law? First of all, the principal repository of perceptual categories is language, and perceptual

5. Ibid.
6. H. G. Barnett, *Innovation: The Basis of Cultural Change* (New York, McGraw-Hill, 1953), pp. 411–48.
7. Goodenough, p. 65.

categories define and "package" events. An individual need not think through the problems his limited sensory apparatus cause, nor "construct a meaning from its basic components." Language is a shortcut, culturally inherited, that avoids these deep and knotty problems. Easily retrievable linguistic symbols "salt away" the structures of the social world.[8]

This being the case, areas that in a broad sense are culturally distinct will differ in the way they structure "reality" (their reality) because each has its own repertoire of perceptual categories. The communications dilemmas that frequently afflict Americans who work in Latin America, Africa, and Asia can be traced to different constructions of reality that manifest themselves in varying conceptions of space, time, individual worth, and the ability of man to control the physical world.[9] It is important to recognize, however, that a difference in everyday language does not, *in and of itself,* mean a difference in perceptual categories. Linguistic symbols, as the term implies, form a code, a way of putting perceptual categories together in a usable way. The arrangements and patterns of phenomena, not the words in which they are expressed, constitute the perceptual categories.[10] Intercultural barriers frequently result only from an inability to jump discontinuities in perceptual categories. The way in which the world is structured is so radically different for, let us say, an American and an Indian that meaningful communication often is frustrated. The same discontinuity also appears between scientists and the lay public and between scientists and humanists, which significantly is dubbed the "two cultures" problem. "It is . . . difficult for us to realize . . . that structures which have no meaning for us may be exceedingly powerful for other people, and that structures which are obvious and unchallengeable to us may be unintelligible to others." [11]

Much space in the earlier chapters was given to various forms of maps, but, in addition to those methods, we can say that the world can be mapped in terms of *shared perceptual categories.* If this is so, what relationships do perceptual categories bear to concepts, customs, and norms? A concept is a collection of "things" that are grouped together because

8. See Tagiuri, "Introduction," in Tagiuri and Petrullo, eds., *Person Perception and Interpersonal Behavior;* and Hobart B. MacLeod, "The Phenomenological Approach to Social Psychology," ibid.

9. See Hall, *The Silent Language.*

10. Goodenough, p. 148.

11. MacLeod, p. 50.

they are in some way or ways alike, but a concept also is "any unified pattern of experience." [12] That is, we group under concepts that which we see is unified, that shares a common characteristic. It also is possible to regard concepts as the free products of mental activities, as generalizations that are derived *from* perceptual categories, and that may or may not have counterparts in the world of sense phenomena. Certainly, the demonstrated richness of man's speculative thought is proof of his ability to generate concepts that are not *directly* linked to observation. For the most part, however, and even within the context of speculative thought, observed reality is the root source of conceptualization. The reasoning process consists of the classification of sense data by perceptual categories, followed by a rule-governed series of manipulations in which new meaning is acquired through novel combinations of information.[13]

Law, of course, is a concept, a collection of rules, as H. L. A. Hart strenuously argues.[14] Further, every legal system contains concepts from which the rules are constructed: "crime," "sovereignty," "property," "feud," "war," "contract," and so on. This approach may seem to divorce law from society (the antithesis of all that has gone before), but the necessary step at this point is to relate ideas to society. In our legitimate desire to understand institutions and human actions we tend to forget that ideas, despite their unobservable character, play a role in what persons do. Therefore we pause at this point to look closely at the interplay between what persons think and what they do. If nineteenth-century study of law was blighted by a too rigorous insistence upon the analysis of ideas, it was blighted only because those ideas were thought to constitute a universe of their own, autonomous and cut off from human action. This justifiable criticism does not in the least imply the insignificance of ideas when they are read into a larger context.

Whether we choose to make a subtle distinction between perceptual categories and concepts, it is fair to say that both of these function in the same way: they are the categories into which unlikes are distributed precisely because we perceive underlying similarities in them. Thus an embryonic linkage appears between perceptual categories and legal concepts, the latter, as it were, constituting the building blocks of the legal rule statements.

12. Barnett, p. 182.
13. Goodenough, pp. 148 f.
14. *The Concept of Law*, p. 16.

Inherently, in one sense, perceptual categories are normative creations because they are the standards of reference against which we compare incoming sense impressions.[15] But this meaning surely is too broad to afford much help in legal analysis. The link will become clearer if we compare perceptual categories and norms. Preferred (i.e. normative) patterns of behavior have a way of emerging, with apparent spontaneity, from previously chaotic and unstructured social situations.[16] A political crisis—even a meeting between strangers—begins with hardly any rules but quickly becomes subject to routine solutions if the participants are to manage the event effectively.[17] As it happens, written and unwritten "rules of the game" take over in an ongoing political system to preserve continuity in the face of disruption. The rapid return of the American political system to a semblance of normalcy after President Kennedy's assassination was due to the rapid manner in which constitutional rules and traditional patterns of deference were applied. If a meeting between strangers thrusts individuals into an unfamiliar and embarrassing context, the shared rules of etiquette usually will rescue them.

It is universally agreed that customs are normative. They are, because of their repetitiveness, considered the preferred ways of doing things—even when they are rigorously separated from law. The human propensity for ordering extends not only to control of the physical environment but to control of the social environment as well. In every social milieu this propensity generates countless examples of similar behavior in similar situations, and many of these, because of the sense of obligation that attaches, are considered "the norm."

We can look at customs in two ways. First, they are "the modal tracks of behavioral events," which is to say that, in unchanging circumstances, customary behavior is the behavior most people adopt. When a lady enters a room the gentlemen rise (at least, let us assume they do). This collective gallantry is due not to unconnected coincidences (they are not tired of sitting and happen to rise at the strategic moment); rather, they have internalized a customary norm, an "if-then" rule which they see applies in the instant circumstance. An observer, having had an opportunity

15. Barnett, p. 183.
16. Muzafer Sherif, *The Psychology of Social Norms* (New York, Harper, 1936), Chap. 6.
17. Barnett, p. 117.

to question them, could say that similarities in behavioral events are correlated with customs.[18]

Second, and at a deeper level, customs provide handy ways out of awkward situations (and not social situations only). As we shall see, the most serious contingencies of primitive and international life are made bearable by recourse to customs. The uncertainty produced by an "unprogrammed" event is quickly solved by the invocation of a relevant custom.[19] A traveler in an unfamiliar culture carries with him a set of norms that is suited to his own culture but has questionable value in dealing with the exigencies of the moment. No book on Middle East travel is complete without a guide to proper behavior at an Arab feast, where an unfamiliar set of rules orders situations among strangers.

In other words, every event or sequence of events that an outside observer would call custom-governed is associated with a perceptual category that allows the events to be grouped under a single norm. They are distinguished from events that are differently governed. This is the same thing as saying that permissible and impermissible events must be identifiable by the persons who engage in them. The generation and application of norms is deeply embedded in cognitive processes. Legal procedures are senseless, inoperable, and—ultimately—nonexistent if there is no way to organize perceptions so that actions can be separated into deviant and compliant. This dichotomization is by no means simply the prerogative of the social scientist who is anxious to systematize his subject matter; law has to place the individual and the group in situations in which choices are real and decisions are possible.

Dewey said that naming is a form of knowing, and the names that lawyers and the law-adept in all cultures use are merely the available tools for identifying actions and making them relevant to norms. To say "state" in international law is not an arbitrary use of one word rather than another: it identifies a legal actor; it forces us to concentrate on some political characteristics rather than on others; it emphasizes events the state participates in over these from which it is absent; and it connects the activities of the state to a set of norms that are relevant to it. It cuts out one segment of the total social environment, so to speak, and concentrates upon it. It is clear, then, that "state" functions as a perceptual category, as do the myriad other concepts from which legal rules are built.

18. Goodenough, p. 254.
19. Ibid.

The jural community of basic shared procedures, fundamental as it first sounded, was not basic enough. Shared procedures can hardly come about apart from shared perceptions of the world. Therefore, to our definitions of jural community we must add the definition of the area within which are shared perceptual categories. We are shocked by bizarre crimes in other cultures, and—not having a sorcery syndrome in Western criminal law—we would be hard pressed to fuse our law with a system that devotes its time and energies to the nefarious ways of the spirit world, as primitive law often does. It is for philosophers to decide whether all of this means there is one world differently perceived or as many worlds as there are perceptions. No matter. It is manifestly true that different perceptions, no matter how grounded, will not produce similar legal systems.

In a general way, then, law seems to be connected with common definitions of the world in which the law is to be applied. What if the case, thus nebuously put, is made more specific as we discuss perceptual categories not as airy unknowns but as they pertain to symbols? Symbols pervade human culture, and, as we shall see, they bridge the gap between ideas and "reality." But how is "symbol" to be understood? It has had its share of definitions in recent years, which testifies to the growing interest of philosophers and behavioral scientists in symbolic behavior.

A symbol, to be sure, is "whatever has meaning or significance in any sense." [20] Within this wide ambit, however, it is necessary to make distinctions. There are "referential" symbols, which serve logic, and "condensation" symbols, which serve the emotions.[21] The general use a symbol serves is bringing up from memory something that has been felt, imagined, thought, or learned. It is a way of making the past accessible. If a thing functions often enough in this retrieving capacity, we are justified in viewing it as a symbol. "If we use several symbols . . . we must connect our symbols with some operating rules. Together, the set of symbols and the set of operating rules form a *symbol system* or a *model.*" [22] The use of symbols in combination is common enough that many examples come easily to mind: systems of mathematics, models in the sciences, games,

20. Harold D. Lasswell and Abraham Kaplan, *Power and Society* (New Haven, Yale University Press, 1950), p. 10.

21. Murray Edelman, *The Symbolic Uses of Politics* (Urbana, University of Illinois Press, 1964), p. 6.

22. Deutsch, *The Nerves of Government,* p. 10.

and even language itself. The omnipresence of things that stand for other things—shorthand summaries of experience—suggests that law also might have a place here.

Law is made up of concepts that are woven into rules—although there may be a good deal of argument about their content and explicitness—and a rule is an if-then statement. In its most basic form—that is, apart from sanctions—such a statement says that *if* specific conditions are present, *then* specific behavior ought to ensue. These are purely formal characteristics, for the moment dissociated from the needs of a particular society. Concepts that combine into rules can be viewed as symbols, as all words are symbols. When the symbols combine into rules and the rules are grouped logically and coherently, a transformation occurs: the symbols form a symbol system.

The arcane manipulations that go on within a symbol system permit the correlation of specific events ("fact-situations" as they are called in the jurisprudential literature) with an appropriate norm. Law is thus a particular kind of language, designed for particular purposes. "In fact, law may perhaps be nothing more than a subservient abstraction—a sort of fiction devised only to simplify the understanding of man's social and political history." [23] The full implications of this statement for law will appear in due course, but for the present it suggests that formal characteristics are shared by symbol systems in general and by law in particular. Both consist of orders for recall from memory, albeit collective memory. In other words, both are made up of symbols. Both combine the symbols with operating rules (a "grammar") in order to form a system. Law is a subtype of symbol systems in general. It shares kinship with even so remote a relation as scientific models at a high level of abstraction.

Can a symbol system be devoid of perceptual categories? This might be possible, but it would be strange to behold—indeed, unbeholdable, for it would be cut off from the world of sense data. If a structure of concepts does not touch the sensory world, it is a socially irrelevant logical exercise. But at this point let us remember that the general function of a symbol is to retrieve a thing or event from memory. It functions, in other words, as the retrieval arm of perceptual categories, and it is fallacious to talk about "perceptual categories" and "symbols" as two different "things." The former are the stored patterns that allow sense data to be

23. Anton-Hermann Chroust, "Law: Reason, Legalism, and the Legal Process," *Ethics, 74* (1963), 1–18.

meaningfully organized; the latter are the triggers by which stored information is brought forward for present use. Because patterns have been built up over time through the repetition of stimuli, the perceptual category also depends upon effective retrieval from the past, upon a continuity of past and present experience. If the stored up patterns cease to match the stimuli of the present, they will in time decay. We can, therefore, regard a symbol as a particular type of perceptual category with a particular task.

None of this, general as it is, deals uniquely with law; everyday language, written and oral, partakes of the same features. Language is a symbol system built of letters, words, and the grammatical and orthographical rules necessary to combine them. It is also, as was indicated earlier, the preeminent repository for perceptual categories. In what sense can we differentiate law from language in general? Clearly, if the two prove coextensive, lawyers ought to be grammarians—a charge that was made against them in the past with devastating effect. In fact, however, a meaningful distinction can be made within every culture.

First, legal rules are conditional statements. If such-and-such circumstances arise, such-and-such circumstances result. If a traffic signal changes from green to red before a car has reached an intersection, the car should stop until the light changes back to green. The frequent confusion between this kind of a rule and laws of science stems from the fact that, although both can be couched in conditional terms, the former is constructed from convenience while the latter is supposed to summarize observable reality.[24] The frequency with which this idea is invoked notwithstanding, we shall see that it, too, encompasses a fallacy. For the moment, it is sufficient to say that whether the conditional statements are substantive, procedural, delegatory, contentual, primary, or secondary—in short, regardless of content or function—they are nevertheless conditional.

Second, these conditional statements, like language in general, can be properly manipulated by a set of rules. The rules, however, may be quite different from and independent of the grammatical rules that prevail in the same area. To be sure, a lawyer who does not know grammar will find the *U.S. Reports* tough going (not to mention the ordeal of constructing arguments). It is one thing to say that lawyers are fair grammarians but quite

24. Weldon, *The Vocabulary of Politics,* pp. 61–69.

another to suggest that grammarians could practice law. It is one thing to parse a sentence but quite another gracefully to avoid a disadvantageous line of precedent. Thus along with the rules of grammar go rules of manipulation that limit the discretion of those who utilize the law. Freedom of manipulation is in part determined by the functions law is called upon to perform, but the overriding function is the preservation of order, because it transcends cultural boundaries.[25] The precise nature of the relationship between order-preservation as a function and the degree of manipulability in the legal system is complex, having its full share of reciprocal linkages and intervening variables, and must be held over to a later section.

Third, law is concerned with ordering social relationships. This was fully grasped by Arthur L. Corbin in his insistence that legal relationships must be analyzed as two-person relationships,[26] and in the observation of Vilhelm Aubert that the legal process involves the transformation of dyadic relationships into triadic relationships.[27] The law is not a monologue. It concerns itself with human interactions and hence with the social realm. It has no room for caprice or whim, but it can and does incorporate means for change. But its prime function is the *ordering* of social relationships, not simply discoursing about them.

As we indicated earlier, a model is a symbol system; thus it shares various and immediate characteristics with language and law. But if model and law may be subsumed under the general rubric of symbol systems, it is equally true that *law can be subsumed under model.* A model, after all, is a representation, a sophisticated and highly developed form of metaphor.[28] For the purposes of the present discussion, we shall assume that a model consists of a set of logically interconnected and ultimately testable statements; it must "fit" the real world of sense data.

The descriptions of law first as a symbol system and now as a model are really not as strange as they may seem. Law is brought into conformity

25. Iredell Jenkins, "Justice as Ideal and Ideology," in Carl J. Friedrich and John W. Chapman, eds., *Nomos VI: Justice* (New York, Atherton, 1963).

26. "Legal Analysis and Terminology," *Yale Law Journal, 29* (1919), 163–73.

27. "Researches in the Sociology of Law," *American Behavioral Scientist, 18* (1963), 16–20.

28. Anatol Rapoport, "Various Meanings of 'Theory,'" *American Political Science Review, 52* (1958), 972–88.

with the widely held belief that it ought to "say something" about the world. Models, after all, are merely summarizations and abstractions of a segment of the world in which reality is set down in a logical, manipulable, albeit highly simplified, form. The form is such that deductions can be made from the model, and these deductions in turn can be tested.

The mind's construction can then be turned to explanation and prediction. The congruence of predictions and events is an index of a model's utility—a concept not wholly unfamiliar to lawyers, who also are in the business of making predictions for Holmes' "bad man." Should the predictions prove false, all or part of the model is regarded as having been falsified, as having fitted imperfectly onto the real world. Holmes' essay encapsulates this hardy empiricism: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." [29] Holmes' career shows that he meant much more, but this thought epitomizes a frequently held view that law is a predictive tool—at least to the lawyer and his clients, real or potential. The frequency with which references to prediction occur in the jurisprudential literature lends substance to the view that, whatever else it may be, law is a model.

We have said that the need for perceptual categories demonstrates the human inability to perceive phenomena directly, without mediation. Perceptual categories are the essential intervening variable between stimuli and response. This limitation on perception extends to the social as well as to the physical environment. Without perceptual categories, action would be undirected and haphazard. Preceptual categories, therefore, are the abstracting tools with which we map physical and social reality.

To the outside observer, society is an organic whole that can be thoroughly and literally rationalized. In the terms of the behavioral sciences, data can be sorted into culture-free categories (except for the inadvertent or irreducible biases and prejudgments between one culture and another). In the process, useful though it is—as our brief excursion into ethnography has shown—something may be lost in the views that members of the observed culture have of themselves. We cannot occupy another's mind and think precisely as he does, and further construction of additional culture-free categories provide no solution. It is possible, however, that we can gain an appreciation of the symbolic idiom through which members of the culture apprehend reality. This approach, moreover, has

29. See Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review, 10* (1897), 457–78.

the advantage of combining systematic categorization with an awareness of the necessary differences between the insider's and the outsider's views. A sociologist who examines the structure of a large corporation will view it rather differently than either a salesman or the chairman of the board. The difference is not only in the scope of the picture (if we assume that the chairman of the board really sees "the big picture"), it is also in the perceptual categories that structure the perception. Indeed, it is precisely in the interaction between the observer's rationalized view and the participants' internalized "map" that new insights develop. The reliance thus far upon the outsider's view does not vitiate the truth of the observations that were based upon these data; it reflects only upon the completeness of the observations.

Law is regarded as preeminently normative. The terms "normative," "prescriptive," "value-laden," and "oughtness" abound in the literature because it is assumed that law represents the articulated "oughts" of a society, which are grounded in widely accepted values. There is, of course, neither purpose nor truth in denying the oughtness of law, and such an exercise would seem perverse. Law states patterns of obligatory behavior. The very nature of conditional statements (if-then) implies a necessary relationship between circumstances and consequences, but we may wonder whether this is all that can profitably be said. Is law no more than a collection of "shalts" and "shalt nots"?

The pervasive presence of statements of value, preference, and obligation should not induce us to erect an unbreachable wall around the law, making what is inside the wall the realm of values and what is outside the realm of facts. The prevalence of such a distinction stems from its utility as an adjunct to methodology and in no way implies that this distinction also obtains in the norm-generating process. The gap between the statute books and conduct has been made sufficiently apparent that it should no longer seem unusual. It did not begin with school desegregation, or with Prohibition, and it has been commented upon by writers on law since Adam ate of the fruit; it has, consequently, proved a productive point at which to examine the law-society relationship. The manifest gaps between statute laws and observed performance led the pioneer in the sociology of law, Eugen Ehrlich, to call the latter "living law." "The living law is the law which dominates life itself even though it has not been posited in legal propositions. The source of our knowledge of this law is, first, the modern

legal document; secondly, direct observation of life, of commerce, of customs and usages, and of all associations." [30]

Fashionable though it may be to point to this time lag between law and behavior or between "positive law" and "living law," it does not tell the whole story. The distinction, despite the vivid examples that have been brought forward to validate it, is not of much assistance in an investigation of customary systems, and, in the long run, the distinction has defects for vertical legal systems as well. Let us remember that segmentary systems and international law have no legislators to depend on. In such societies, then, what is the relationship between prescription and performance? We can cast some light on the problem by looking at the ambiguous usage of the word "norm."

Thus far we have used norm to denote a pattern of behavior to which a sense of bindingness and obligation attaches; as synonymous with "custom" and "rule"; but the term has another usage: as a statistical norm. "Normal" behavior corresponds to majority tendency; but something can be a "norm" without being "normative." If most men wear three-button suits we do not conclude that they feel truly obligated to do so; it is a fashion that we realize can change over time. There are however, other statistical norms that follow a different route.

Many practices, normatively neutral at first, eventually compromise their neutrality. A natural conformist tendency attaches a normative connotation to a prevailing usage. If a particular behavior pattern becomes widespread, it soon becomes obligatory.[31] The transformation of central tendencies into obligations, of statistical norms into binding norms, recalls Goodenough's statement that customary practices are "the modal tracks of behavioral events." Armored knights who raised their visors to signify friendly intent could not have envisioned that modern men would tip their flimsy headwear to ladies because etiquette would demand this.

The ground of behavior from which norms grow indicates that law has not simply a value component but also a fact component. If, as seems likely, normatively neutral behavior becomes tinged with obligation, rules that are recongized to be normative should be traceable to their behavioral antecedents. We should be able to trace customary law to the practices that gave rise to them. To some extent, the fact component in law is

30. Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (New York, Russell and Russell, 1962), p. 493.

31. Hoebel, *The Law of Primitive Man,* p. 15.

implicit in a conditional statement. As the minimal condition for obedience, the circumstances in the if-clause must occur. The prohibition against robbery is pointless if no robberies take place, just as laws against the slaughter of buffalo are irrelevant in jurisdictions where the buffalo is extinct. It is correct to say that a legal system embodies modal behavior, although it must be specified whose modal behavior and modal at what point in time. Modern vertical legal systems seem to fall somewhat outside this category. Given the caveats of social, spatial, and temporal location, a substantial number of norms arise from behavior as unpatterned situations are routinized. As for law in its innovative capacity, the innovation often means the imposition of one group's modal practices on another group.

Above and beyond this, there is another sense in which law is fact-oriented. We have discussed law as a codification of existing or previously existing practices. But facts, in and of themselves, are meaningless; they achieve meaning only in juxtaposition with other facts. What, then, can we consider to be a fact? A fact is a sensorily apprehended event, any entity or relationship that can be located in space and time. Thus defined, facts do not live lives of their own; they mean nothing as discrete packets of information. They are energized by being placed in a context.

We render facts significant by grouping them, and, taken together, they are subsumed under "concept." A number of such agglomerations of facts can then be amalgamated under a still more inclusive concept; and these inclusive concepts can be nested still further through the discovery of a still wider relationship. This is, of course, immediately recognizable as a ladder of abstraction. If it was not for this ladder it would be impossible to make the kind of predictive generalizations that are embodied in legal rules. The nexus we have alluded to, between naming and knowing, places an object within one class rather than another, saying that it is more closely akin to some things than to others.[32]

Without an abstracting process it would be impossible for either the outside observer or the participant to have a picture of society. Having no way of getting at likenesses and unlikenesses, the world would appear patternless. Again, perceptual categories provide the patterns by imposing a delimiting repertoire of forms over amorphous reality. The vocabulary of law (its collected concepts) is a subgroup of perceptual categories within

32. Edelman, p. 131.

the prevailing language and is distinguishable from it. This further binds law and facts together, for the latter are organized and made meaningful through the categories of the former. Sense is made of experience—that is, facts achieve meaning—by virtue of the classifications that perceptual categories, both of everyday speech and a culture's "legalese," allow.

Legal concepts are the concepts within a jural community that define community structure. They allow the establishment of relationships among its constituent elements. Chroust, in a quotation we cited earlier, said that law is "nothing more than a subservient abstraction"; it is, he said, a way of simplifying social and political history.[33] This is a large order. Philosophers are systematizers of logic, although all peoples have a logic of everyday experience.[34] Social scientists are supposed to be systematizers of social structure, but all peoples, similarly, have their own pictures of social structure and of the prevailing relationships among individuals and groups. If they did not, social scientists would be spared incessant criticism in areas in which everyone conceives of himself as an expert.

Law is that system of manipulable symbols that functions as a representation, as a model, of social structure. Its fact content appears on two levels. First, law contains statements of modal behavior, for it was from these that obligatory norms arose. Second, law contains perceptual categories through which events can be abstracted and similarly dealt with; it has the capacity for generalization. In this latter sense, law's effect can be felt even before the formulation of the rules because perceptual categories structure the situations to which the rules are supposed to apply (this characteristic will loom large in our further investigation of stateless societies). Thus our "subservient abstraction" turns out to be indigenous social theory, which is placed not in the hands of theorists but of practitioners—practitioners of the law and the ordinary citizens who have much more to do with law than make an occasional appearance in traffic court. Conversely, social science theory is a particular type of representation or model that, in a sense, preexists in every society, albeit in the pragmatic and diffuse form we call law.

If this has itself proceeded high upon that ladder of abstraction, it has only been to prepare the way for the more specific discussions in the next two chapters. Besides filling in blank spots on the theoretical side, chapters

33. "Law: Reason, Legalism, and the Legal Process," p. 14.
34. Goodenough, pp. 150 f.

6 and 7 will return to the contexts of the societies we discussed in detail earlier and then put aside: segmentary lineage systems and international relations. Because the yield of legal concepts, so fruitful in such familiar areas as American constitutional law, is so refractory here, we have had to make a wide digression to seek customary law and (inferentially) law in general at its roots. Below the surface appearance (or nonappearance) of coercion are the less visible but often more important considerations that are raised by integration and perception. The several strands we have spun off will come together in the archetypal process of horizontal legal systems: mediation.

6. Meditation I: The Invisible Mediator

"Jaw-jaw," remarked Churchill, "is better than war-war," and from one point of view this observation on conflict management can hardly be improved upon. But it does not answer the question "Why?" nor does it distinguish between jaw-jaw techniques. Fighting and discussion historically precede or follow each other, in seemingly unending series of transformations. In this and the following chapter we shall look closely at two classes of conflict-to-conference procedures: (1) the antagonists talk it out without the aid of a third party; (2) a third party is physically present and a functioning factor in the conflict-management situation.

One of the most commonly made distinctions is the distinction between law and bargaining. The differences may seem obvious, but, like most "obvious" differences, they become less obvious the more closely they are scrutinized. The difference most frequently remarked upon is that law is a triadic relationship (i.e. involving a third person) and bargaining is "dyadic" (i.e. engaging the energies of only the two immediate antagonists).[1] More of this later; what concerns us now is another alleged difference, the relative importance of norms. Law is conceived as revolving around conflicts of values while bargaining depends upon conflicts of interests.[2]

There is a surface plausibility for this dichotomy. Everyone at one time or another has struck a bargain, and we know that this entails mutual satisfaction and mutual dissatisfaction: each side feels it has perhaps given away more than it should have, although each continued to reduce demands until an agreement was reached. In everyday life this usually involves sums of money, for bargains translate tangibles and intangibles into the single measure of dollars and cents. It is almost a stipulation of bargaining situations that complete satisfaction is never attained; the limited "goods" to be distributed see to that. More importantly, however, a bargain struck, imperfect though it is, is perceived to be far more advantageous than the uncertain result of a go-it-alone policy. If maximizing gains is the name of the game, a bargain, for all its shortcomings, is the best solution.[3] Bargaining is rational in that it brings means and ends into the most productive juxtaposition, but it introduces further ambiguity into the conflict-cooperation relationship by demonstrating that the best solu-

1. Aubert, "Competition and Dissensus," *Journal of Conflict Resolution,* 7 (1963), 26–42.

2. Snyder and Robinson, *National and International Decision-Making,* p. 119.

3. Ibid.

tion to a conflict of interest lies in cooperation. The results for each party depend upon decisions made by the other; [4] that is, consensus is based upon the recognized interdependence of gain and loss. Labor and management often find they are made strange bedfellows by economic circumstances that thrust them together so that each party may prosper.

By contrast, law is supposed to involve disagreement, a lack of consensus, on the application of norms to facts. Further, law is supposed to provide an objective framework within which a dispute may be placed for solution by a third-party. Paradoxically, it is the norms of the law that, by their shared character, provide the objective framework within which the trained jurist, through his arcane manipulations, can settle the quarrel. Thus law has transformed a conflict of interests—the presumed genesis of a dispute—into a conflict of values the better to resolve it. The conclusion seems inescapable that bargaining is a nonnormative activity, and thus the Norwegian sociologist, Vilhelm Aubert, whose ideas our discussion incorporates, regards it. "A bargain struck leaves no mark upon the normative order, it is not a consequence of it, nor does it become a constituent part of it." [5] Before we accept this position, however, we should take a closer look at the bargaining process.

Bargaining has rigidly utilitarian connotations of solution through the most rational and pragmatic means, unencumbered by the inhibiting force of ideological commitment. This, however, is by no means as clear as it first appears. Aubert admits that the interrelationships between law and bargaining are subtle and complex, for a market price is a kind of norm and a former settlement can become a precedent, which suggests the existence of a normative substratum in bargaining. If reference to a market price impels a buyer and a seller to a different solution than they would reach in isolation, bargaining may not be as rational and coldly calculating as had seemed. Further, if the past extends its reach into the present by way of binding precedents, we can legitimately ask how independent the considerations of self-interest really are.

"Interest" and "value" are too complex to survive total separation. "Interest" is nonnormative as long as each interest is separate and discrete, but this is a counsel of perfection. We rank our interests in terms of their relative desirability, arranging them in a hierarchy of values.[6] We can at

4. Thomas C. Schelling, *The Strategy of Conflict* (New York, Oxford University Press, 1963), p. 5.

5. Aubert, "Competition and Dissensus."

6. Liska, *Nations in Alliance,* p. 82.

least hypothesize that the "line" between law and bargaining is not a line but merely an infinite number of points along a continuum. Between the conventionally accepted views lies a no-man's-land of solution that is neither wholly law nor wholly bargaining, or perhaps it indicates that the distinction is untenable. The literatures of segmentary lineage systems and international relations are replete with instances of negotiated settlements in which a low degree of institutionalization nevertheless exhibits greater adherence to norms than a pure bargaining model would indicate. The regularity with which such settlements take place and the sense of continuity between cases suggest that the normative substratum may be closer to the surface than was previously thought.

How should we proceed? One way is to grasp the other characteristic that Aubert imputes to the legal process: the dyad-triad transformation, the introduction of the third party. "Third party" is an awkward term because it must do multiple duty, suggesting a Supreme Court justice, the Secretary-General of the United Nations, or the Dinka's master of the fishing spear. The appearance is different but the process is similar. The touchstone of legal analysis is no longer sanctions but the person, persons, or institution that intervenes between conflicting parties. If "third party" is an unaesthetic way of putting it, perhaps we can substitute "mediator," which also causes problems because, within labor relations and international law, it has been subjected to highly refined and technical definitions. However, the functions served by distinctions in one area may have to be sacrificed to serve other functions of wider compass.

Let us, then, use "mediator" to signify the third party, subject to the limitation that it must have three main characteristics. First, there must be conversion from two-person to three-person interaction. India and Pakistan, when they arrived at the conflict-management phase of interaction, were joined by the Soviet Premier. Second, the mediator may, but does not have to, operate in a case-by-case manner. In stateless societies the formal role structure may be very slight and there is no guarantee that mediation will always be undertaken by the same individual. Third, the mediator can be independent of the means of physical coercion. Just as the mediator can function in many consecutive cases, he is not precluded from calling upon coercive forces; if the applicability to horizontal legal systems is to be maintained, however, this cannot be made a necessary condition. Such a mediator comes to the conflicting parties, often at their initiative, to suggest potential solutions and/or facilitate mutual concessions.

All this must seem exotic and contrived in view of the culturally derived images that structure our perceptions of legal functionaries. The positive law systems we know best have a ready-made repertoire of images, not the least potent of which is the judicial triad of plaintiff, defendant, and judge, arranged in a pyramidal structure with the judge seated at the apex as arbiter. While jurisprudence was dominated by the philosophy of John Austin and his followers, there was never any doubt that this was the controlling image. Now we must try to shed it, for the judge-mediator does not always have direct contact with the sovereign's power, and it may be that there is no sovereign. We must admit the possibility of mediation within a completely contingent role structure, with actors playing interchangeable parts: he who today is mediator perhaps is tomorrow's combatant and the next day may slip behind his old persona. The function of mediation remains, even as its locus shifts.

Let us, for the sake of argument, accept a rational bargaining model: every actor—an individual or a state—goes for the main chance. A corollary is that at every point of decision the available alternatives are *initially,* in a sense, homogeneous. Every alternative must be equally visible and each must be subject to the same process of analysis and evaluation. In the language of game theory, one's maximal losses must be held to a minimum. Thus alternatives are weighted only *after* the decision-making process has started; all begin equal. Various possibilities are discarded as prohibitively costly and the remaining alternatives are ranked until one of them emerges as optimal.

How frequently, in point of fact, does such a rational process occur? The rational sifting of alternatives means that all are equally considered in terms of the same standards of self-interest. Every competing policy (like the rival ideas hawked in Milton's intellectual marketplace) starts with an even chance of acceptance. The fact that all alternatives are viewed on a plane of equal visibility requires that all be initially perceived as equally possible final choices. However, the selective operation of perception renders this unlikely in the extreme; the simplifying assumption of the model crumbles in the face of a refractory and uncooperative world. Equiprobable alternatives would have to be associated with evocative stimuli of equal strength and they would have to be presented to the decision-maker almost simultaneously. The fulfillment of both conditions in the real world is impossible.

The "leveling" assumption contradicts all that we know of perception; we do not see everything we might, or approach decisions without pre-

judgments, nor are we unswayed by the type and order of presentation. Schelling suggests that some alternatives naturally "dominate" others in our perceptual field; we see some as stronger and more obvious than others. He calls them "focal-point solutions." [7] He also suggests that there are many situations in life, ranging from hikers separated in strange terrain to nuclear powers confronting each other, in which no coordination seems possible but takes place anyway. Two travelers, say, arrange to meet "in Grand Central Station," but only after they depart on their journeys does each realize the gross generality of the phrase. It is virtually certainty, however, that both will go to the information desk at the center of the waiting room—not one to the magazine stand and the other to the Oyster Bar. In other words, each will independently choose a coordinating solution that has coordinating potential because it is perceptually conspicuous to both travelers. Each person's expectations are accurately mirrored in the expectations of the other. A common clue allowed accurate prediction and a dovetailing of behavior, even though there was no direct interaction between the two, or messages passed, or institutional guidance. The arrangement of the environment into more or less conspicuous packets produced an effect akin to Adam Smith's invisible hand. The situation became self-regulating because both persons "read" it the same way.

"Finding the key, or rather finding *a* key . . . may depend upon imagination more than on logic; it may depend on analogy, precedent, accidental arrangement, symmetry, aesthetic or geometric configuration, casuistic reasoning, and who the parties are and what they know about each other." [8] This sentence echoes two matters that were mentioned earlier. First, with its emphasis on patterned stimuli, it speaks the language of psychology, thereby suggesting perceptual categories. The two separated travelers reached a common destination only because they had "read" reality in identical ways. They looked for, and by looking found, the features of the landscape they sought. The fear of accidental nuclear war stems from the belief that the nuclear powers will somehow misconstrue events, misinterpret the messages that seem implicit in the actions of the potential enemies. After evaluating the role of China in the Vietnam war, the United States had moved upon the premise that the bombing of the

7. Schelling, p. 57.
8. Ibid.

northern capital would be interpreted merely as part of the perceptual complex called "the Vietnam conflict," not as a component of a larger conflict directed at China itself. This conclusion was based upon the supposition that Americans and Chinese, in organizing the world that is external to themselves, did this in like manner.

Second, solutions that have already been utilized perceptually dominate those that are merely contemplated. All other things being equal, what is done is what has been done in similar circumstances in the past. Precedent receives the sanction of selective perception. What was done in an analogous case emerges as a norm that governs the present. In other words, modal behavioral patterns emerge as norms because they appear as islands of conspicuous order in a sea of random activity. The sources of precedent and custom now interlock. The transformation from norm to normative, from mere repetition to obligatory behavior, results from the fact that repetition increases conspicuousness.

In the narrow confines of Anglo-American law a precedent is simply a prior decision that operates as a constraint on and a legitimator of a present decision. In a broad sense, however, past decisions constitute a pool from which a present solution may be drawn. Every precedent, by virtue of usage, is a focal-point solution and will be chosen over unused alternatives because it is more highly visible. The burden of proof, as it were, rests on the innovations.

Attempts to verify Schelling's hypotheses indicate that, among individuals in laboratory situations, coordination is possible through the focal-point solution. The structural properties of the situation or cultural stereotypes—or a combination of both—elicited satisfactory dual responses.[9] However, experiments that used not single-trial bargaining situations but multiple trials and a less-than-ideal level of information broke down the coordination. A second set of experiments, with increased information, seemed to restore the utility of the focal-point solution.[10] The greater success that was obtained in single trials is added confirmation for a salient feature of segmentary and international systems: almost invariably, disputes are handled more successfully on a case-by-case basis than as

9. Richard Willis and Myron L. Joseph, "Bargaining Behavior. I. 'Prominence' as a Predictor of the Outcome of Games of Agreement," *Journal of Conflict Resolution, 3* (1959), 102–13.

10. Myron L. Joseph and Richard Willis, "An Experimental Analog to Two-Party Bargaining," *Behavioral Science, 8* (1963), 117–27.

components of a larger conflict. A bargaining position that is significantly more visible than a competitor's can dispel some of the chaos that confronts noncommunicating individuals and can guide them to a common solution.

The fact that very often a model of rational choice from initially equiprobable alternatives founders in the world places a greater weight upon precedent, although this influence is derived from socio-psychological rather than legal bases. It has been observed by students of labor settlements that a strike often ends with a contract that is much less advantageous for one of the parties than could have been achieved.[11] One side or the other failed to press its advantage in the manner a rational model would dictate. Such settlements, more often than not, paralleled a past contract instead of expressing partisan self-interests. The aluminum and the copper industries, fully aware of the outcome of President Kennedy's earlier price struggle with the steel producers, offered only token opposition to President Johnson's drive for price stability, who undertook the effort in the aura of his predecessor's conspicuous success. In terms of perceptual categories, courses of action that have been patterned by precedent are more conspicuous than untried courses of action. Consequently, some categories of perception, having developed over a longer period of time than others, allow various forms of behavior to acquire a more patterned aspect than others. Apart from the chances for its success, the initial British naval blockade of shipping bound for the independent Rhodesian government was taken in much better stride by world opinion than the comparable and earlier American effort vis-à-vis Cuba. It is not merely that the earlier episode involved vastly higher stakes, the earlier, innovative action provided a pattern for subsequent actions. Precedents are focal-point solutions—conspicuous perceptual categories that, through usage, have achieved normative status.

Two-person situations (dyads) are not conventionally regarded as relevant to law. Even Hohfeldian analysis, with its emphasis upon the primacy of bilateral legal relationships, took for granted that the sovereign always stood in the wings. Coercion and judicial institutions were assumed. But what does one do with so-called two-party bargaining situations that have *precedent* solutions? Are they bargains? Schelling regards focal-point solutions as especially crucial in a special case he calls "tacit

11. Schelling, pp. 67 f.

bargaining." The parties are not required to be in any direct communication but must instead rely on similar readings of the same internalized "map." [12] Whether or not one adopts Schelling's typology, there are clearly a number of means of dealing with conflicts which do not conform to the conventionally held notion of bargaining, yet which involve the clear appearance of coordination.

Frequently the final "bargain" struck does not seem to accurately reflect the power differential of the parties.[13] Of course, our ability to assess what might have been possible is based upon a suspicious degree of "iffiness." Yet when all is said and done we may have grounds for wondering at the sweet reasonableness of the settlement. Bargaining, then, is not always broken down into discrete, arithmetic balances of interest, neither conferring value nor creating obligation. The blurring of the law-bargaining boundary now seems virtually complete. If precedent indeed enters even when the mediator does not, then previously "normless" situations turn out to be the very settings in which norms are most likely to develop. For normativeness and precedent are bound up with one another, insofar as precedent means merely the acceptance of a prior norm or prior decision in a present instance. Thus the association need not be simply with common law systems, in which past court decisions are accepted and invoked with the same, indeed sometimes greater, willingness as statutes themselves. Even the civil law systems of continental Europe are firmly anchored in the veneration of past law, except that the law is encapsulated in codes rather than strewn through countless separate court opinions. Precedent—in this sense of normative continuity—is the antithesis of the presumed conception of law in the ancient world. Sir Henry Maine, with perhaps a dash too much of Victorian romanticism, paints the picture of the ancient king dispensing justice, literally in his court-yard, and relying not upon the past but upon the immediate inspiration of a kind of judicial muse.[14]

The normative component in two-party dispute management notwithstanding—be it labor negotiations or the give and take of bilateral diplomacy—the third party seems notably absent. Again we return to the often cited fact that horizontal legal systems are without courts and judges, and

12. Ibid., pp. 58–67.
13. Ibid., pp. 68 f.
14. Henry Sumner Maine, *Ancient Law* (Boston, Beacon Press, 1963), pp. 4 f.

sometimes not even the services of an informal mediator. Not, be it noted, necessarily from lack of availability. The presence, at least in international relations, of a pool of trained "arbitrators" since the late-nineteenth-century arbitration movement has produced only another example of the conspicuous underemployment of legal talent. Presumably, in primitive societies as well, talented individuals often fail to give of their expertise because structural imperatives make third-party intervention difficult. However, despite the broad and unconventional usage of the term "mediation" thus far, the true operation of conflict management in horizontal systems will remain concealed as long as it is used; as long, that is, as mediation depends upon the physical presence of the mediator.

There is more than intellectual caprice in the suggestion that mediation can and *does* take place without a mediator, but it is not a matter of occult powers nor of remote-control intervention. It is, rather, a matter of legitimate conceptualization. If we always search for a particular person or institution to act as the mediator, we must often be disappointed. To carry on the search in this manner, looking simply to identify persons or organizations, is to fall into a formalist trap. Political science has tried to extend its horizon beyond the analysis of constitutions and formally organized bodies. A narrow concern for the assertions of documents or for the powers of legally constituted organs of government mistakes appearance for reality, confuses visibility with significance, and substitutes (however inadvertently) sophisticated description for explanation and prediction. In short, the temptation remains great to concentrate on concrete structures to the detriment of analytic structures.[15]

It is much easier and more in keeping with the dictates of common sense to look only at what has obvious, discernible boundaries: Congress, the President, the Supreme Court, the United Nations. If we were to take seriously the task of bounding even these, we might quickly find ourselves up against major epistemological obstacles. But treaties, laws, and constitutions provide the shortcuts for quickly, easily, and (apparently) convincingly demarcating them from their environments. Analytic structures, by contrast, originate in the mind and need not correspond to a single, sensorily apprehended part of the real world. They are not, in principle or in fact, *physically separable* from the rest of the real world. It is possible,

15. Marion J. Levy, Jr., "Some Aspects of 'Structural-Functional' Analysis and Political Science," in Roland Young, ed., *Approaches to the Study of Politics* (Evanston, Northwestern University Press, 1958).

at least in theory, to establish spatio-temporal boundaries for Congress, quite another to assert the same limits to the "rule-making functions." It is easy for the social scientist to set his eye on "the courts," and only slightly to concentrate on "the mediator." Perhaps even the somewhat more analytic mediator still hews too closely to the safe haven of common sense. The world is, after all, understood in the end largely through unobservables, and conflict management might turn out to be far more comprehensible if we would begin to disengage ourselves from the obvious.

The physically present mediator, as we shall see in the next chapter, often functions as a communications link between belligerents, and this function has preeminently been associated with organized diplomacy. Diplomats of one kind or another have flourished since the time of the ancient Near East [16] (but for modern Western diplomacy the Renaissance is a more accurate starting point [17]). In primitive societies, modern observers have come upon countless examples of official message-carriers, but these systems have not coalesced into a conventional form or unified practice.[18] What of situations in which there are no message-carriers, not because of the absence of "civilization" but because the context does not demand or permit them? How is concerted action carried out in the interests of conflict management? Even when disputants sit down face to face, very real communications problems often hamper effective action. How, then, can face-to-face negotiations succeed if a third party does not mediate the differences? To what extent is the final settlement a bargain?

In a mathematical model each separate decision may be regarded as discrete and independent. In the real world, in which this simplifying assumption rarely operates, decisions often are interdependent.[19] An individual or a group cannot fully govern its own actions; the latter are modified by the combined force of others' decisions, over which the former has little control. The coexistence of interdependence and conflict parallels the earlier paradox of order and conflict. Although we usually think of interdependence as a counterpart of amity, it occurs not only between fast

16. Bozeman, *Politics and Culture*, p. 30.

17. See ibid., Chap. 13, and Garrett Mattingly, *Renaissance Diplomacy* (Baltimore, Penguin, 1964).

18. See the compendium in Ragnar Numelin, *The Beginnings of Diplomacy* (London, Oxford University Press, 1950).

19. Schelling, pp. 15–16, 83–118.

friends but between confirmed enemies as well. The absence of regular channels of communication does not, however, spell automatic failure for concerted action, even when the actors are in conflict. Conflicting actors or parties, although estranged in many respects, may nevertheless share a common, internalized "map" (discussed in the preceding chapter). They may still view reality in very similar ways and be separated only on transient issues. If their shared legacy includes perceptual categories that they hold in common, the map will be much the same for both. Because both parties view the world through similar lenses, approximately the same features will appear on the two maps. Therefore the crucial question is: If the maps are roughly identical, will they be *read* the same way by both parties? An irreducible margin of ambiguity beclouds all representations and permits divergent interpretations. What is shared may be merely a matter of principle that can play no significant coordinating role in the sphere of human action.

We must begin with this assumption: When there is no direct and/or effective communication, it is easier for two parties to choose the same alternative if the alternatives from which they must choose are held to a minimum. In a crude probabilistic sense, this is beyond cavil. What is done must of necessity be related to what can be done; the less that can be done, the easier it is to predict what will be done. We are well along on the road to prediction when we can specify the true possibilities for choice. An erroneous prediction frequently is the result of an unconsidered alternative instead of an incorrect guess among available options. The predictive problem is more difficult when we require two correspondingly correct predictions, one for each side to a dispute. The most deterministic situation exists when both sides see themselves as having but a single option. No matter the lack of direct communication, the outcome happily is foreseeable. When there is more than one option, a single alternative must appear preeminent if choices are to be made on an interlocking rather than on an antagonistic basis.

We are now in a position to characterize the kinds of options that must exist for conflict management. First, the number of options both sides perceive should be as few as possible (the single-option situation is doubtless a counsel of perfection, but the fewer the better). Second, both sides must recognize the same, or very nearly the same, set of options. There must, in other words, be a large overlap between the potential courses of action both sides see before them. Third, the options must be as unambiguous as

possible. If involved interpretations are required, conflicting "readings" may sabotage concerted action. (The experiments we mentioned earlier bore out Schelling's contention that physical isolation is not a bar to cooperation, given commonly held premises and information. Such laboratory manipulations involve an artificially simplified universe, however, from which sources of ambiguity can be effectively purged, but the real world is a place of misread cues and misconstrued messages. The history of espionage demonstrates that true secrecy is almost nonexistent, but the agent's report that could have tipped the enemy's hand almost always has been misfiled, mislaid, or misread.)

Fourth, if the options constitute a set (rather than a single choice), one of them must be demonstrably better than the rest. It must be a focal-point solution that perceptually dominates the others. Fifth, and most important, the choice among options must be a perception of self-interest that includes the self-interest of others. The continued existence of the antagonist of the moment must be recognized as necessary and desirable, and the continued survival of the entire system of which both sides are a part must be accepted and supported. (Fulfillment of the first four conditions, after all, could be possible in a condition of protracted and implacable warfare. System perception as a component of self-interest, on the other hand, is part and parcel of the limitation, not of the proliferation, of conflict. A system in these terms is a notion of the shared fates of the actors, the perception of shared fates being held in common. It is a naïve, indigenous social theory.)

Next we would seek the particular means by which these five criteria can be met. When the desire to preserve the system is a factor in making decisions, it is questionable whether it does any good to continue to speak of bargaining or negotiation, pure and simple. Bargaining and negotiation are supposed to constitute independent events by social calculating machines—to be tied to a "what's in it for me?" attitude. Although states, tribes, and individuals have been known to go far toward maximizing profits, as it were, it is too much to advance as a universal the statement Thucydides put in the mouth of the Athenians at Melos: "The strong do what they can and the weak suffer what they must." [20] The advantage in the long run often means the sacrifice of advantage in the short run, and the extent to which this is embodied in action is remarkable. The percep-

20. *History of the Peloponnesian War* (trans. by Crawley, New York, Modern Library, 1951), p. 331.

tion that a whole system is at stake comes between the conflicting parties, and we can say that system-preserving values themselves constitute an *implied third party*.

These values intervene to blunt more parochial and violence-producing interests. The system, as it is perceived by the participants, may offer many values: trade, barter, reciprocal use of grazing lands and waterways, a more mutually advantageous distribution of economic goods, and so on. Military alliances enhance security from attack and an alliance of coreligionists permits fuller participation in ritual functions. Unification in the face of a culturally alien enemy may help preserve cultural values that are felt to be important in themselves. All values can be seen as being enhanced through reciprocal relationships among a system's parts. A system, after all, thrives on complementary expectations, on knowledge that common or symbiotic ends characterize the policies of all.[21]

Various values, then, effectively cut across and transcend quarrels. The quarrels notwithstanding, both sides see that mutually beneficial values can be achieved only through coordinated choices that are made in a particular decisional situation. Each party, at each decision point, must predict the effect his decision will have on the other. A "correct" prediction is a prediction that is equivalent or complementary to one that is made by the erstwhile opponent. To the extent that both parties correctly perceive the social environment and its demands upon them, they will be able to hold their dispute within limits. But only the most conspicious focal-point demands will commend themselves to both parties. Behavior patterns that do not perceptually dominate the alternatives for both parties are less likely to be chosen by both. The more conspicuous the alternative the more likely it is that both parties will recognize it as the "obvious" one. Shared perceptual categories provide the common set of patterns with which antagonists pattern sense data, presumably organizing it into common maps.

The conditions under which such simultaneous recognition is possible must be carefully delimited because every self-regulating process, in the marketplace or a living organism, is fragile and easily disequilibrated. Implicit mediation—shared values without a physically present mediator —requires a balance between social consensus and social complexity. There must be sufficient consensus so that there is an agreed-upon set of categories and agreement that the system per se constitutes a higher value.

21. Paul Bohannan, *Social Anthropology*, p. 302.

However, there must not be so many possible choices that choice-making becomes a thoroughly randomized and uncoordinated process. It might be more accurate to say that there is an area within which implicit mediation is feasible and beyond which even the appearance of coordination is lost. This area lies between the randomness of nonintegration and the prolix and ambiguous norms and symbols of high integration—a transitional zone between social disorganization and the state. The middle ground is an area that is sufficiently integrated to possess system consciousness and shared categories that are capable of imposing a common order on phenomena. The minimal degree of integration makes a full-blown institutional framework impossible and even a personified mediator of questionable efficacy. Implicit mediation is a means of lowering the intensity of conflict when the parties are minimally interdependent and lack workable specific procedures.

Decisions are based, in part, on the weight that is assigned alternatives according to criteria of self-interest. It is conceivable that in some circumstances an actor's concept of self-interest runs no farther than his own borders. The situations that are covered by implicit mediation are predicated on a concept of self-interest that is wider than and overlaps the self-interest of others. The substantive issues that are covered may be few. Indeed, the requirement that the number of options be limited is a corollary of the proposition that the problems to be solved must be limited. Implicit mediation, unlike the free-market mediation, is not conceived as an omnicompetent problem-solver. It lends itself only to a small class of disputes in a small class of settings. The number of shared perceptual categories is related to perceived distance. In the same way, effective implicit mediation depends upon a critical zone along the dimension of perceived distance—somewhere between total estrangement and a closer grouping—that can give rise to formal institutions. It is easy, of course, to talk in this general fashion and we might continue in this way without becoming involved in cases. The foregoing, however, stands or falls on evidence more than on logic. For this reason alone there is much to be said for curtailing additional abstract discussion of implicit mediation in favor of its examination in the familiar contexts of segmentary lineage systems and international relations.

In segmentary lineage systems the realm of implicit mediation is tantamount to the realm of diplomacy. Disputes within a lineage may be settled by the elders, but the mode between lineages is either fighting or bilateral

meetings—"activities which verge on what Westerners think of as diplomacy." [22] This is a natural feature of stateless societies inasmuch as relationships must be instituted among relatively autonomous units. Diplomacy is a means for surmounting communications barriers where common symbols make communcations in principle possible. Occasionally—by no means usually—the negotiators are proxy figures who speak in the name of a lineage much as a professional diplomat articulates the wishes of his superiors.[23]

Implicit mediation most often occurs on what we can call the outskirts or margins of the jural community, for it is at the margin that the process of coordinated choice is sufficiently simple to be feasible. The actors can be face to face, as the customs of diplomacy require, but they may also be physically separated, when taboos or physical distance make direct contact impossible. In the former case, negotiations may be undertaken to manage a dispute that both parties view as potentially destructive of their economic well-being if fighting continues. Units that are economically interdependent, particularly through the sharing of a marketplace,[24] are motivated to "settle" (or de-escalate) through direct discussions.

Some shared perceptions determine such vital decisions as the commencement of hostilities, an assembly of alliances, and the declaration of truces. The decision to take military action, to seek a verdict by force, depends upon several considerations, such as the intervening spatial distance, possible supernatural sanctions, and, of course, lineage relationships between the antagonists.[25] The lineage system, as we have had occasion to note, is often a symbolic representation of the distribution of groups over space. Should conflict escalate to the stage of physical violence, the degree of violence depends upon a reading of lineage (i.e. perceived) distance. The factors that would be taken into account in such a reading would almost certainly include the manner of fighting and its bitterness, the frequency and seriousness of provocations, the extent of looting, burning, and farm damage, head-taking, and slaving, and the stigmas and taboos that might be produced by homicide.[26] Again, we must emphasize that these will

22. Ibid., p. 281.
23. See Jean Buxton, "The Mandari of the Southern Sudan," in Middleton and Tait, *Tribes without Rulers*.
24. Laura Bohannan, "Political Aspects of Tiv Social Organization," ibid.
25. Le Vine, "Anthropology and the Study of Conflict."
26. Laura Bohannan, "Political Aspects of Tiv Social Organization."

vary with lineage distance, a form of perceived distance, and not with physical distance alone. The latter, clearly, could not adequately explain the hostility that had been generated between one tribe and another along a common, if fluctuating, border.

On the surface, these acts may seem unilateral, based upon the independent assessments of one side or the other. How, then, can they be made to seem bilateral, let alone in some way triadic? The answer lies in their concealed complexity. Such acts do not take place in a vacuum; there is provocation, response, perhaps a counter response, and so on. This is an event sequence that runs from breach of norm to counteraction, and perhaps to an indeterminate sequence of stimuli and responses.[27] The norm, in this sense, is a rule that is accepted as binding by the society. Because the rule is binding and because there is nothing that even remotely resembles centralized sanctions, the obligation for redress of the breach falls to the injured party;[28] he and his kinsmen can *legitimately* retaliate. Their right to retaliate is unquestioned, either by the society at large or by their antagonists. It is in the nature of a self-help system that retaliation is both a right and an obligation, binding the injured to avenge himself and giving moral sanction to his act. Our society has a phrase for this: "taking the law into our own hands." But we must "steal" the law from its rightful place; in a multicentric society the law is properly appropriated by anyone who requires it. Self-help, when it occurs, is always recognized as justified; and anyone who breaches a norm can expect self-help to follow.

The feuds and quarrels that accumulate between segments are set aside, if only temporarily, when an external threat appears. The phenomenon by which segments almost automatically group themselves for a fight also is self-limiting, ending at precisely the point that lineage requires. When sibling groups are joined, expansion ceases; at this point the two sides are equally related or unrelated, depending upon how one wishes to look at it.[29] There are various levels at which the blood feud can operate, but the variation is rule-governed. Even societies that do not have the blood feud, such as the Tiv, maintain the practice of symmetrical fusion and fission in conflict situations.

27. Paul Bohannan, *Social Anthropology,* pp. 283–307.
28. Mair, *Primitive Government,* pp. 35–60.
29. Sahlins, "The Segmentary Lineage," *American Anthropologist, 63* (1961), 322–45.

Thus, even though sanctions are widely dispersed, there is a strong sense of the demands that are placed upon both sides in various sets of circumstances. For most contingencies there are behavioral demands, so that after a group has assessed its position vis-à-vis other groups it usually behaves in a prescribed, societally ordained manner. This conformity to rules is blurred, however, by the attendant violence. Whether one does or does not enslave the enemy may not seem to evidence law—but we accept fine distinction over what targets a bomb may be dropped on and when self-defense is an adequate defense against a murder charge. The point, of course, is that we can see that rules of primitive law operate, once we accept the face values of such a society.

At any point at which a decision must be made—whether it involves breaching a norm, ceasing hostilities, or negotiating—the demands often are clear to both parties. Lineage provides a conceptual framework that all accept and through which rights and duties are ascertained. To call such reckoning "bargaining" and nothing more would cause considerable confusion, for, in effect, the lineage system superimposes a series of social priorities on unalloyed calculations of interest. What can or cannot be done constrains everyone except the most reckless or alienated. Thus all alternatives do not spring from a condition of equiprobability; each is immediately perceived as more or less feasible, as lineage demands.

It has been said that the blood feud is a mechanism that operates outside the law,[30] and, because of its destructiveness and irreversibility, this seems to be true. Occasionally, both in Africa and in southern Europe, the implacable logic of the feud results in mutual extermination, as, over a period of years, descendants of the original combatants try to kill each other. Three qualifications, however, must be added to this grim assessment, and they lead, I think, to the conclusion that at times the feud is a conflict management device and within the law. (1) Violence and destructiveness, no matter how repugnant to us, do not violate the nature of law, which tries to assure regularity rather than tranquillity. (2) Feuds seldom lead to the logically ultimate consequence; instead, the havoc that is wreaked on both sides motivates the parties to seek a mediated settlement through a physically present mediator (which will be discussed more fully in the next chapter). (3) The feud is a device for insulating conflict within prescribed familial bounds; whatever the violence between the parties to the feud, the rest of the society is effectively protected by lineage rules.

30. Paul Bohannan, pp. 290 f.

International law also has its self-applying rules. Although "graduated response" has gained currency through its use by military strategists, the idea is firmly embedded in traditional legal practice. In a sense, international war is the counterpart of the primitive feud because usually it is assumed to exist within rather than outside a legal system.[31] International relations has a good measure of self-help, and such regulatory influence as international systems possess lies with the states themselves.[32] Countering the frequent observation that international life is a normless chaos, Brierly comments: "Violations are rare in all customary systems, and they are so in international law. . . . For the law is normally observed because . . . the demands that it makes on states are generally not exacting, and on the whole states find it convenient to observe it." [33] The implication is that states are able to perceive the convenience clearly, and without external institutional aid.

There have, in fact, been many cases in which the absence of direct communication did not preclude coordinated action; both (or all) parties accurately grasped the idea of interlocking self-interests. The most frequently studied example of this is surely nineteenth-century Europe. At its best, statecraft in the last century produced a series of equilibrations without a major war.[34] Today we look back upon the balance-of-power era as a kind of golden age, and so it was, in terms of the control that states collectively exerted upon threats to the status quo. The period demonstrated the possibility of self-stabilization by means of judicious short-run alliances. Preventing a single-state hegemony over Europe may not strike us as particularly noble, but at least it was well within the range of possibility. In conflict situations there was recognition by the states that various alliances would restabilize the system by counterbalancing the aggressor, and that other alliances would continue the concentration of power by one state at the expense of the others. The continuation of such systems depends upon the survival of complementary expectations.

Complementary expectations, in turn, depend upon perceptual sim-

31. Josef Kunz, "Sanctions in International Law," *American Journal of International Law, 54* (1960), 324–47.

32. Rosecrance, *Action and Reaction in World Politics,* p. 230.

33. J. L. Brierly, *The Law of Nations,* ed. Humphrey Waldock (6th ed. New York, Oxford University Press, 1963), pp. 71 f.

34. Julius Stone, *Aggression and World Order* (Berkeley, University of California Press, 1958), p. 106.

plicity. Ancient China, with its own well-wrought version of the balance of power, correlated simplicity and complementarity. The creation of patterns or routines of state behavior gave each state expectations of the actions of its fellows, from which it was possible to construct fairly accurate forecasts of responses to a particular situation.[35] Falk's description of a horizontal norm shows that a similar idea has infused Western international law: "A descriptive proposition about what nations will probably do in light of the interplay of events, interest, conscience, and rule; it is a predictive generalization which acts as a comprehensive ground rule for behavior."[36] This same pattern of complementary expectations is at work today in the intricate maneuvers of the nuclear powers; each is outwardly oblivious of the others but each acts as if it has full knowledge of them. The suspicions entertained against a nuclear China have their origin in the fear that China may act in ignorance or defiance of mutual behavioral expectations.

There is a belief nowadays that the formalities that attended a declaration of war have, through fear of nuclear weapons, fallen into disuse. However this may be, the lengthy history of the process by which a state of war comes to exist demonstrates the existence of common perceptions. In the segmentary systems it is useful to distinguish interlineage conflicts (feuds) from intersocietal conflicts (wars), which points up the relationship among integration, shared perceptions, and the intensity with which a conflict is prosecuted.

When there was a sharp separation between Europe and the rest of mankind, a similar distinction was in force. The medieval church found it convenient to make a distinction between "private" wars (between Christian rulers within the feudal systems) and "public" wars (which pitted Christendom against a heathen enemy).[37] A formal notice of war was communicated by letter or herald. Formal though this procedure was, it became even more elaborate until well into the last century. Great effort was expended on making the move into war a considered and public action. Today, even international lawyers acknowledge the legality of war

35. Walker, *The Multi-State System of Ancient China,* p. 107.

36. Richard A. Falk, "The Legal Control of Force in the International Community," in Saul H. Mendlovitz, ed., *Legal and Political Problems of World Order* (New York, The Fund for Education Concerning World Peace through World Law, prelim. ed.).

37. Bozeman, *Politics and Culture,* p. 268.

without a formal declaration of hostilities,[38] but we must remember that this has been due principally to modern advancements in weaponry.

The absence of such a declaration is not a substantial limitation on the possibilities for coordinating decisions because other signaling procedures have arisen to take its place. From the nineteenth century on, a complete repertoire of message-laden actions has been available to the world's foreign ministries: the withdrawal of ambassadors, termination of consular relations, a combination of diplomatic and consular breaks, denunciation of treaties, recognition or nonrecognition of a third government, conspicuous war games or maneuvers, the visit of a gunboat, mobilization, and so on.[39] All of these actions fall short of war. The twentieth century, in turn, has added new gradations: the cessation of foreign aid, securing adjacent bases, dispatch of military advisers, and harassment of travelers.

The ranking and choice of alternatives for system preservation can take place with or without direct communication. All cognitive processes are much the same, as we can see from a comparison of cognition in independent decision-making and in negotiation. The former assumes many perceived realities rather than a single objective world. The decision-maker therefore must "carve" from the phenomena before him the objects, events, symbols, conditions, and persons he deems relevant, setting the others to one side. "Of the phenomena which *might* have been relevant, the acts [the decision-makers] finally endow only some with significance." [40]

Negotiation or bargaining (i.e. face-to-face communication) is closely related to decision-making. The ground rules demand careful construction of an agenda, limits on possible concessions, the possibility of changes in rules after negotiations have begun, and limitations on the outcome because of positions previously taken.[41] Reality is carved up and values are placed on some segments but not on others. In both cases implicit mediation lies in both parties' endowing the same, or at least complementary,

38. Oscar Svarlien, *An Introduction to the Law of Nations* (New York, McGraw-Hill, 1955), p. 335.

39. William W. Bishop, Jr., *International Law* (New York, Prentice-Hall, 1953), p. 559.

40. Richard C. Snyder, H. W. Bruck, and Burton Sapin, "Decision-Making as an Approach to the Study of International Politics," in Snyder, Bruck, and Sapin, eds., *Foreign Policy Decision-Making* (New York, The Free Press, 1962).

41. Snyder and Robinson, *National and International Decision-Making,* p. 122.

alternatives with special significance. Only shared perceptual categories can endow system preservation with meaning. If system-preservation is not the overall goal, there is no general state of affairs to which both parties can tend. In addition to consensus on the existence of shared fates, there must be shared perceptual categories if there is to be a common set of alternative solutions. The alternatives, in turn, must be few in number (to make a coordinated choice possible) and one alternative or a pair of complementary alternatives must be perceptually dominant for both sides.

The examples we have cited certainly are not capable of making conflict disappear. But even a courtroom is not without conflict (except, perhaps, for the nonadversary procedures about which we as yet know little). In horizontal multicentric systems, conflict is channeled, not made to vanish. After the channeling, to be sure, much violence may remain (witness our cultural revulsion at feud behavior or the peace that is no peace between the two Germanies and the two Koreas). Physical violence, however, provides no easy index. Not long ago in Western societies, ordeals and duels existed as *less violent* alternatives. The relatively greater degree of violence in the societies with which we have been dealing is within their limits of tolerance. Because they are stateless and possess a structure with many centers, conflicts in one locale need not spill over into others.[42] It is possible, in principle and in fact, to insulate conflicts internationally, as a feud is insulated. The unconcern of Europeans for the Vietnam war is testimony to the survival powers of the distantly related: conflict between two segments on one side of the genealogical tree goes on independently of segments on the far side.

The concept of escalation implies that conflict increases in magnitude along the dimensions of violence, span, and intensity. However, its present-day association with war and other violence-prone situations masks the fact that a form of escalation is built into many societies. In the United States, the development of national issues through the gradual coalition of interest groups increases and intensifies conflict. What is of greatest importance is that, at many stages in the escalation process, there are mechanisms for adjusting differences and obstructing total and final polarization.

42. M. G. Smith, "A Structural Approach to Comparative Politics," in David Easton, ed., *Varieties of Political Theories.*

Such mechanisms abound in centralized systems but in uncentralized systems they are nonexistent or little-used. We have seen, however, that escalation is not an automatic process, uncontrollably moving all conflicts to maximal size. How escalation proceeds is a matter for human decision; it is not blindly mechanistic. Human decision rules provide guidance, be they rules derived from a lineage or state practice; they are part and parcel of the minds of the decision-makers. Traffic police are desirable in large cities but they are not stationed on every corner; instead, an accurate version of the traffic laws is supposed to be part of every driver's mental equipment (if it were not, even stoplights would be of no help). This phenomenon is rather close to the psychoanalytic concept of the superego. Whatever the image, the internalization of norms and their use for predictive purposes constitutes implicit mediation.

Because persons within a system often take its norms for granted, they may not think about the normative component in their decisions and may, instead, concentrate upon interest calculation. Constraints, by definition, are the immovables of a situation, the limitations, and most of us dwell upon factors over which we believe we have a measure of discretion. Consequently, we gloss over or fail to see the extent to which rules shunt decisions into particular paths; and the normative system, like a disembodied spirit, enters into the decisions of a society so that they will mesh with each other. A common system of rules is (in mixed metaphors) a silent partner of decision-making, a kind of third party.

The efficacy of implicit mediation, however, is relative; and mediators may be physically present. Mr. Kosygin at Tashkent was neither a disembodied spirit nor a silent partner. Although we might wish that third parties played a larger role, they are from time to time in evidence, and it is well to distinguish their activities from those in situations where the rules and the rules alone "manage" conflict. The next chapter, therefore, will be given over largely to physically present, or what I have called explicit, mediation. Together with implicit mediation, it suggests some of the factors that keep stateless societies on an even keel and it also has some lessons for state legal systems, wherein law plays an even larger role than the courts assign it.

7. Mediation II: Law and Societal Complexity

Having treated mediation, however cursorily, as an analytic structure does not absolve us of the necessity of treating its concrete side as well. The importance of the normative component in bargaining has been ignored, but this is easily and wholly explicable in terms of differing conceptualizations. It is less easy to explain the neglect of the few observable mediation situations, whose existence none would wish to deny, that have nevertheless gotten short shrift from legal scholars. Perhaps the fundamental reason for this is the refusal to face the significance of mediation even in the American legal system, a rejection that has been duplicated in international law.

Conventional legal decisions—court decisions—are nonprobabilistic.[1] In other words, no matter how ambiguous the evidence, the judge, with or without a jury, makes a definite, unqualified decision. It is guilt or innocence, even if the evidence points to faults on both sides. The "certainty" in a judicial decision is fundamentally at odds with evidence that frequently cuts both ways. There is only the defendant and the prosecution or plaintiff—never a complete social situation; and with the task of apportioning blame goes the unenviable duty of suppressing elements in a case that suggest that merits and faults belong to both of the parties in a litigation.

It will of course be said that mediation (as defined earlier) is present and significant in the American judicial process but it takes place at a low level of visibility. Implicit mediation also is a fundamentally important means of managing conflict, even within the confines of the court system. A sentencing "deal" in a criminal case puts attorneys in a negotiating relationship. The pretrial conference in the judge's chambers may produce a settlement that makes further litigation unnecessary. The out-of-court settlement, wittingly or unwittingly stimulated by the court system, is reminiscent of primitive or archaic jurisprudence. The importance of these phenomena notwithstanding, the formal and visible incorporation of mediation into American law requires deliberate reforms that only now are beginning to receive the discussion they deserve.[2] Growing dissatisfaction with personal liability laws and increasing pressure for ombudsmen at the local level make inevitable open and detailed discussion of the uses of com-

1. Aubert, "Researches in the Sociology of Law."

2. One of the most incisive analyses of the problem is in John E. Coons, "Approaches to Court Imposed Compromise—The Uses of Doubt and Reason," *Northwestern University Law Review, 58* (1964), 750–94.

promise, even in a legal system as ramified and structured as our own. There is no necessary reason why mediation cannot function openly and successfully alongside a court system that is dependent on written legal rules. Japanese conciliation machinery, from the Tokugawa shogunate to the present time, flourished in a code-law society.[3] In the United States, similar processes have been admitted and encouraged only within the insulated realm of labor relations.

It is therefore plain—certainly as far as American legal theorists are concerned—that we shall find little to make the investigation easier. The selective perception that rejects all thought of mediation performs a similarly unfortunate editing function within international law. If only because, for all practical purposes, international courts discharge only a fraction of international legal business, it has been impossible to ignore mediation altogether. Classical literature takes the position that mediation settlements, though perhaps inevitable, are inferior to adjudicated settlements—that the goal is a court system, for which mediation is an inelegant and unsatisfactory prelude. Despite increasing evidence that the World Court is a fragile reed,[4] embryonic international tribunals still receive the lion's share of attention.

Implicit mediation (described in the preceding chapter) is a self-help system par excellence; the disputing parties function not only as the police but as judge and jury as well. In such a system the legal concepts are the lenses through which the particular social world is seen, and the resultant perceptions dictate the alternatives. But it was a precondition for successful operation of implicit mediation that the world be an intrinsically simple world, and the more involved reality becomes the more will uncertainty becloud the decision-making picture. Even if both parties try to concert their strategies to preserve their system, who can say that their choices are more likely to be complementary than contradictory? The two

3. Dan Fenno Henderson, *Conciliation and Japanese Law—Tokugawa and Modern* (2 vols. Seattle, University of Washington Press, 1965). Henderson says "conciliation" is "a negotiated compromise result, not necessarily in conformity with applicable legal norms, but encouraged by an impartial third person and agreeable to the parties" (*1*, 1).

4. William D. Coplin, "The World Court in the International Bargaining Process," in Robert Gregg and Michael Barkun, eds., *Functions of the United Nations System* (Princeton, Van Nostrand, 1968).

forms of conflict management with which we are concerned here—implicit and explicit mediation—conform to various levels of societal complexity; the former requires a simpler social milieu than the latter.

How can simplicity and complexity be differentiated? There are many means of making the distinction: on the bases, say, of technological achievement, literacy, or division of labor. For our purposes, however, three other factors deserve attention: the frequency of transactions (discussed at length in Chapter 3), the number of corporate groups (to be treated shortly), and the ease with which societal structure can be symbolically expressed (the subject of Chapter 5). The present chapter consists of a general discussion of (1) the requirements increased complexity places upon law; (2) the structural requirements of explicit mediation; (3) the means available for changing legal rules in stateless societies; (4) a close examination of these problems in terms of segmentary and international systems; and (5) the role of fact-discretion in mediation. Just as each chapter has built upon the preceding chapters, the present section is built upon material that was introduced earlier as it relates the following concepts to explicit mediation: transactions, integration, conflict, jural community, perceptual categories, and symbol systems.

The section on implicit mediation (Chapter 6) dealt with settings in which interdependence was acknowledged but scarcely practiced. Thus implicit mediation works better between the middle-level (secondary) lineages than between the smallest (minimal or tertiary) lineages. It functions better between blocs or between distant states (e.g. the U.S. and the U.S.S.R.) than within firmly knit international communities. Earlier sections also demonstrated that the frequency and the routes of interactions in large measure determine cohesiveness and integration. The greater the number of transactions and the more numerous the transactional flows, the more likely it is that the units will achieve higher levels of communal self-awareness.

We need not dwell on the interactions nor the number of corporate groups because the number of parts that comprise the whole also is directly related to integration—through the previously remarked-upon phenomenon of cross-cutting conflicts and allegiances. In a general way, the multiplication of corporate groups—those that act toward others as if they were individuals—multiplies interests. The term "interest" has been subjected to the cross-fire between group theorists and their antagonists for a long time, particularly to charges that the term ascribes existence to something that does not have an empirical foundation and of concrete treat-

ment of that which is at best analytical. We will stay clear of the debate by saying there is at least a strong probability that groups that differ in composition or circumstances will want things that either are different or that both cannot possess at the same time. It will be immediately apparent that the degree to which a world of groups overlaps in membership will in large measure determine the corporateness of the groups and the intensity with which they pursue their divergent aims.

Finally, there is symbolic ambiguity. We touched upon symbols earlier but did not say very much about their clarity. The frequency with which most of us must consult dictionaries indicates how uncertain we are of the meanings of words in our own language. Symbols are means by which massive quantities of information can be managed, but they occasionally are subject to disturbances and fluctuations in meaning. Wherever symbols are used—wherever man is found—the same possibilities are realized. In the legal systems of multicentric societies the possibilities emerge in a characteristic manner; because these are self-help systems, the responsibility is conferred upon each segment or state to judge its own case. Self-judgment, like the more common case of conventional judicial action, implies that the judge interprets the concepts of the law (e.g., robbery, murder, or war). Each symbol, each perceptual category, is treated according to the lights of the actor who is involved, subject only to the limitations imposed by the culture.

The authoritativeness imputed to these interpretations depends upon a group's assessment of its isolation. If subsystems are almost autonomous, the absence of ties permits each subsystem to regard its reading of law as correct. This is true whether a question turns upon knotty problems of lineage or national sovereignty. Under implicit mediation, this quality of independent authority exists, but each actor, by voluntary action, can choose to coordinate his interpretation with what he presumes will be the interpretations of his antagonist-partner. The factors we have already discussed—interactions, number of groups, and cross-pressures—must surely affect this situation, for as these increase in frequency the actors share more and more symbols. As they hold more and more symbols (a larger and larger symbol system) in common, more and more divergent interpretations become possible.

The relationship between symbols and integration runs in two directions. Integration, the grouping of people, produces more and more symbols for facilitating communications by their constantly increasing range of relationships. But integration per se is given an assist by symbols be-

cause the ambiguity of symbols provides rallying points. Differences in objectives can be set aside as everyone asserts allegiance to flags, rituals, emotion-laden terms, or legal documents, which, in their generality and uncertainty of meaning, reduce differing interests to a common denominator.[5] In other words, symbols have an *inherent* potential for ambiguity. There is, therefore, legitimate discretion in their interpretation, and, as we shall see, this gives valuable leverage to the explicit mediator. Different interpretations are equally legitimate as long as the parties regard them as such, or as long as they refuse or are unable to see the differences.

Symbolic ambiguity, whether of words, visual images, or rituals, can therefore be an index of societal integration—an indication that slightly different groups accept the same symbol set. At the same time, symbols' potential for multiple usage and meaning (what Julius Stone calls the "plurisignation" of words[6]) allows them to become common rallying points. Marginally different groups can accept the same set of symbols because their marginally different interpretations do not call the legitimacy of the symbols into question. Earlier we saw that law is a symbol system, and thus these general observations also apply to law. The peculiar way in which these fairly abstract characteristics find expression in law will be dealt with in another section of this chapter.

It is perhaps axiomatic to say that every social organization requires behavioral regularity. Various key functions must be performed through purposeful action, but if all of these actions cannot be performed by a single actor, predictability also is essential. And the more complex the society the more pressing the need for predictability. If we can presume that role specificity and the division of labor are by-products of increasingly frequent interactions, these, too, demand predictability so that entire social processes will not be disrupted because of the failures of a few individuals who perform minor but essential social functions. Thus order and, by inference, law must perform functions (at least different in degree) for societies at varying levels of complexity.[7]

5. Quincy Wright, *Problems of Stability and Progress in International Relations* (Berkeley, University of California Press, 1954), pp. 214 f.

6. In *Legal System and Lawyers' Reasonings* (Stanford, Stanford University Press, 1964), pp. 31 f.

7. Schwartz and Miller, "Legal Evolution and Societal Complexity."

It is a commonplace to say that law lags behind developments in society, and, despite the innovative efforts of American courts, the saying is fairly accurate. As we have seen, customary norms arise from modal behavior, and there is bound to be a lapse between an action and the time it acquires normative overtones and can be stated in propositional form. Law, as we also have seen, is a set of interrelated symbols that pertains to the organization of social relationships; it is a model of society. Just as every model should "fit" the real world it presumes to represent, law, too, if it is to escape the charge of irrelevance, must correspond to its world.

Time lag means that all or part of a law model does not fit the world it purports to represent. Traffic laws that are based upon slow-moving city traffic are inadequate for expressways; but, more to the point, the law of war that was developed to suit the requirements of conventional explosives is of questionable value in dealing with the new demands of nuclear weapons (an idea that goes back to the concept of "living law" as proposed by Ehrlich and elaborated by Northrop [8]). A time lag can manifest itself in two ways: (1) the discrepancy between rule conduct and observed conduct may increase or decrease; (2) the number of rules that are subject to a time lag may increase or decrease. As a society grows more complex it follows that the number of its propositions that refer to behavior will increase. There is no denying the social necessity for the multiplication of legal rules. Unfortunately, however, this introduces a new problem, for there is a concomitant increase in the number of points at which the legal system can be out of phase with reality. Complexity multiplies the incidence or opportunities for law-reality discrepancies.

Complexity thus ensures an increase in the difficulty of finding a definitive meaning for symbols. Both as a corollary and in independent considerations, it also ensures that these symbols will to some degree fail in one of their principal aims: they will not provide actors with an adequate, unfailingly accurate social map. It is a vicious circle. Societal complexity requires symbolic complexity so that the societal complexity can be understood, but complex symbols beget complex and unsure meanings, thus undercutting the foundation of their existence. The map the symbols provide will be so equivocal in some areas that reading it will be difficult.

Implicit mediation depends upon what we can call "actor reading" of the social map. Again, each group must see and apply the law for itself.

8. Northrop, *Philosophical Anthropology and Practical Politics,* pp. 3 f.

But how can a group do this in a complex milieu? The answer is that such perception and application is possible, but there is increasingly less assurance that others will see and act in the same way, which in turn makes coordinated decisions increasingly difficult to achieve. The actor-centered mechanism of implicit mediation becomes more and more problematic. How can one know what others expect of him or what one can realistically expect of others? Definitions of a particular situation may differ sufficiently that, even in face-to-face dealings, coordinated action is foredoomed—and precluded even more when face-to-face relationships are impossible. The limitations of implicit mediation are clearest at this point. The vacuum is filled by a physically present mediator, by explicit mediation.

The preceding pages tried to show that extreme difficulties attend implicit mediation. The foregoing also makes clear that the factors of complexity that place the greatest burdens on law are those that most bind a society together: transactions and cross-pressures. A minimal level of integration is essential for every legal system if it is to have a consensual base; this is as true for implicit mediation as it is for explicit mediation. There are, however, different degrees of integration. Integration provides, as it were, the infrastructure for even the simplest legal system, but it also determines the level of a society's demands on the legal system. The chapter on implicit mediation (Chapter 6) explored conflict management at the outer reaches of a system, the areas traditionally given over to bargaining. These areas possess sufficient integration to cause quarrels and to allow for their solution if their social topography is sufficiently simple and bold to permit implicit mediation. In such settings, the actors must look to implicit mediation because the integrative-consensual base is not sufficently strong to bear judicial institutions. Whether from far-sightedness, ignorance, or indolence, British colonial policy tampered little with primitive law. It decided not to superimpose a highly articulated Western court system, except in such cases as sorcery, which deeply offended British conceptions of "natural justice."

As one moves from periphery to core, from less to more integration, from few to many subsystem overlaps, social capacities and social requirements permit greater structure. In this environment, in which the social map is unclear and actors cannot always orient themselves by a few bold symbols, we find explicit mediation. The sections that follow deal with smaller lineages and smaller components of the international system

than our earlier discussions. Although explicit mediation represents a quantum leap in concreteness beyond that of its analytic precursor, it is still sanctionless. Sanctions still exist on a self-help basis, if they exist at all, even as judicial interpretation loses some of its diffused character. In fact, the ultimate guarantors of conflict management, as before, are consensus on procedures and on perceived mutual self-interest.

As Chroust remarked, law may be nothing more than a "subservient abstraction" that aids an understanding of history, and we have explored the model-nature of law at length: it is a representation. Time lag, forever making law an object for antiquarian interests, continually sets law against a changing and refractory reality. Segmentary and international systems do not have the means for central and rapid alteration of the law to close this gap. Even the more frequent use of multilateral treaties has not made international law substantially less customary than it has always been. Change is slow, and gradual, and never the exclusive province of any group or institution. How is it, then, that horizontal law can maintain a meaningful relationship with reality?

Indeed, it is much harder to deny the relationship than to give reasons for its existence. To deny the relationship would be to assert that segmentary and international societies have for generations accepted, and professed to be governed by, norms that long ago ceased to have any relevance—if, indeed, ever. It also would be tantamount to saying that some of the most powerful intellects in Western law, as well as significant portions of the social science community, were not studying a fundamental source of social order but were, in fact, trying to put flesh on the ghost. These assertions have, in fact, been made, but have not been followed through to a logical conclusion that casts doubt upon the intellectual foundations of modern humanistic and scientific scholarship. Moreover, the means for change exist.

Despite an absence of central institutions, norms can be changed to meet changing conditions. The key to the adaptive process, however, is a concept that has been little cherished in English and American law: the legal fiction. Despite Anglo-American lawyers' sensitivity to changes in the law, engendered by the incremental growth precesses of the common law, it has not fared so well. To better understand the role of the legal fiction in horizontal law, we must first have an acceptable definition. It has been regarded as a legal assumption that something false is true, as an assump-

tion that a nonexistent state of facts has truly come about, as an assumption of the existence of a fact that is false but serves the purposes of justice, and as a legal rule that assumes the truth of what may conceivably be false—with the proviso that there be no attempt to seek disproof.[9] It is immediately clear, however, that these definitions are partial and that the air of duplicity that surrounds them helps explain the disrepute into which the fiction has fallen. The fiction connotes the noble lie and seems to be an ignoble device that prevents law from coming to grips with reality.

The latter, of course, in principle and in practice, is antithetical to its real function. The noninvidious uses of the legal fiction were first discerned by Sir Henry Maine, who suggested that there are three devices for adapting the law to new conditions and who asserted that they grew chronologically: first the legal fiction, then equity, and then legislation. Because equity and legislation presuppose an institutional framework, the legal fiction (which does not) is most valuable in studying multicentric societies. Maine, with his customary sharp eye for behavior, included in his concept of legal fiction "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." [10]

In the 1920s the fiction became the pivotal point of the philosophy of the neo-Kantian Hans Vaihinger. His larger scheme need not detain us here but his discussion of the "juristic fiction" is of interest. He suggested that the key to the fiction lies in subsuming a case under a concept not originally intended for it. Vaihinger regarded this as less a matter of deviousness than a manifestation of the insoluble problem that general rules can never properly encompass all specific cases. Hence every act of categorization is to some extent an "as if" occurrence, treating the singular and unique event *as if* it fully conformed to the dictates of the rule or concept under which it had been categorized. Significantly, Vaihinger thought the appearance of the fiction was a consequence of increased complexity in legal relationships.[11] It is only a matter of degree, but we think nothing of classifying individuals as "legal persons" but recoil from the notion of grouping Du Pont or General Motors with individuals.

9. Henry Campbell Black, *Black's Law Dictionary* (4th ed. St. Paul, West, 1951), p. 751.

10. *Ancient Law,* p. 24.

11. Hans Vaihinger, *The Philosophy of "As If"* (New York, Harcourt, Brace, and World, 1925), pp. 33, 19–20, 143.

It is part and parcel of the incompleteness of man's knowledge that there are exceptions to all rules. Rules, in a sense, generate their exceptions through their imprecision. The inadequacy extends to systems at all levels of complexity. The richness and the contingencies of life make every classification system a leveling process in which particulars are lost or ignored because every such scheme has an element of arbitrariness. It is never wholly true that an event or a person can be placed in a single, fully definitive category, as opposed to all other categories—a circumstance upon which the continued operation of appellate courts depends. The uncertainty over the proper legal niche for legislative malapportionment—whether the political doctrine or the equal-protection clause—was a legitimate uncertainty that was built into the law.

The desire to create a system that allows no exceptions, laudable though it may be, is utopian. In order to cover all contingencies, a legal system would have to provide not only a complete and minute description of society as it presently exists but also as it will exist in the future.[12] The fact that law is an instrument for achieving behavioral regularity notwithstanding, some instances will always fall in the interstices between the rules. Either because of a unique conjunction of facts or because higher values dictate an exception, it may be necessary to stretch or contract rules and concepts beyond the normal discretionary limits. That this is done is in itself noteworthy, and even infrequent utilization of the legal fiction demonstrates two things.

First, it is testimony to the desire (paradoxically) to preserve the integrity of a legal system as a whole. That this fidelity can be served by bending legal rules is not a species of Orwellian double-think but, instead, is evidence of the desire to preserve the general applicability of the law and of a corresponding reluctance to permit events to fall outside it. Of course, this desire may itself be a fiction, the "fiction of completeness," [13] the belief that a legal system can do the impossible. A legal system does not easily comprehend all that goes on about it, but individuals who are under its sway believe wholeheartedly in its utter inclusiveness.

Second, the utilization of the legal fiction tell us a great deal about the rate at which law is supposed to change. Legislation can change norms

12. Chroust, "Law: Reason, Legalism, and the Legal Process," *Ethics, 74* (1963), 1–18.

13. Field, "Law as an Objective Political Concept," *American Political Science Review, 43* (1949), 229–49.

rapidly but the legal fiction is a much slower-acting instrument. It preserves norms even as they become less and less suited to real-world conditions. The preservation, of course, is only in outward appearance; in practice, whatever must be done is done. The legal fiction legitimates what otherwise would be exceptions to a rule. By assuring the legitimacy of exceptions and by allowing them to accumulate, it turns them into precedents that eventually will lead to changes in a rule. The stretching of a rule to bring exceptional cases shifts the rule's "center of gravity" but the legitimation of exceptions ensures that change will proceed by increments, not through sudden reversals or additions (as we are accustomed to in legislation and through judicial review). (Although we accept the desirability of rapid normative change for our own and similar societies, the question is academic for stateless societies, in which rapid change of any sort is exceedingly difficult. Literature on millenarian movements suggests it is not impossible in primitive societies, just as the evidence of war demonstrates the protean capacities of the international system. Insofar as normative change is concerned, however, it must occur in bits and pieces or not at all.) Thus it is thoroughly logical that the legal fiction (at least in Maine's sense) should provide horizontal law with its much-needed adaptive potential.

We shall see that the notion of the legal fiction, as long as we confine its operation to stateless societies, builds upon the other features of stateless law that we discussed earlier. It is not, as its name suggests, a gimmick for bootlegging change into a system; it is thoroughly compatible with and dependent upon the concepts of integration and symbols that have occupied us thus far. In its independence from authoritative central institutions it is perfectly suited to the "invisible hand" type of self-regulation—although in the present context the hand is more tangible because of the physical presence of a mediator. In this connection—and before we inquire into specifics of the fiction in segmentary and international systems—it is well to remember that even the explicit mediator cannot compel the parties to a conflict to utilize his services or to honor his suggestions.

The fiction Maine especially noted he called the "fiction of adoption." Even in the small sample of archaic societies he studied, he noted that kinship-oriented societies could be expanded, although membership was severely circumscribed by family connections. The invented "loop-

hole" was the construction of fictitious genealogical relationships that made manifest strangers part of a societal family.[14] This same fiction also operates within some primitive societies today; a stranger who is cut off from his own tribe suffers the "rightless" fate of the "non-person," much as stateless persons in more advanced countries. The "moral essence," as it were, lies in one's obligations to kin; non-kin morality is a contradiction in terms, and only through the legal fiction could rights and obligations be made applicable to outsiders.[15] The mere existence of the fiction in such a context seems anomalous, for is not lineage empirically determinable? In what sense can something as definite and verifiable as parentage be transformed into an exercise of indeterminate conclusions? One is or is not descended from particular ancestors. This may be the meaning for the social scientist or the biologist, but, within a lineage system, the concept has considerably greater fluidity.

The lineage system does not in and of itself prescribe conduct; conduct is the business of rules of behavior. On the other hand, conduct sets down various social relationships, and norms cannot be meaningfully applied without taking these relationships into account. Putative genealogical distance determines the meaning and consequences of action.[16] Whatever the oughts are, they exist only in reference to specific lineage relationships. The norms are meaningless if they are divorced from the applicable fact-situations. The legal process has long been recognized as a matching of norms and facts, and lineage provides the latter half of this relationship. A jural community, as we have said, is the area within which an all-inclusive organizing idiom is used, be it lineage, sovereignty, or something else. Thus the largest area that comprehends an overall, common lineage framework constitutes a jural community because everyone within this area shares approximately the same map of the society.

That this map is only approximately the same for everyone is the crucial point. It should be clear by now that the conventional separation between a lineage system and a legal system is purely analytic and in no way specific and mutable. Neither could exist in reality independently of the other. From an anthropological perspective it may be useful to regard

14. Maine, *Ancient Law*, pp. 125 f.

15. May Edel and Abraham Edel, *Anthropology and Ethics* (Springfield, Ill., Charles C. Thomas, 1959), p. 90.

16. Elman R. Service, *Primitive Social Organization* (New York, Random House, 1962), p. 126.

them as separate (because analytic categories, in their own way, are a species of fiction); from a legal standpoint, however, such separation deprives a legal system of an essential component. Without the lineage framework, legal decision-making at any level of complexity is impossible. Therefore we must regard the lineage framework as an integral part of the legal system of segmentary societies; to fail to do so would be equivalent to studying our own legal system without reference to "person" or "state."

Segmentary societies, in the schematic view we have presented, seem to be extremely rigid, but the rigidity tends to disappear under closer scrutiny. Part of this impression results from the learning process itself: although anthropologists learn genealogy systematically and as an interrelated whole, a Tiv, for example, learns his genealogy piecemeal and never learns all there is to know.[17] Indeed, the overriding structuralism of, say, British social anthropology [18] has concentrated on symmetry and homogeneity at the expense of flux and variation, but the true picture lies somewhere in between. Discretionary acts also are important, for the conflict-management process often goes beyond the mechanical and ritualistic. Our Supreme Court, after all, combines the flexibilities of discretion and the constraints of precedent. In fact, there are hints of subsurface complexities even within the classical ethnographic literature. Between closely related Nuer, disputes rarely are simple transgressions of general rules; they also involve qualifying considerations of kinship, affinity, and age.[19] In light of this we may proceed on the assumption that inasmuch as disputes differ in complexity their handling also will vary.

Ethnographers frequently refer to mediators as possessing some kind of expertise but there are two reasons why a mediator is used. Utilization manifests the respect the parties have for community ties while testifying to the fact that such a figure as the Nuer leopard-skin chief is a "ritual expert." Clearly, through his utilization of ritual, the leopard-skin chief performs mediative functions. Evans-Pritchard's tendency to emphasize ritual at the expense of mediative expertise doubtless is based partly on the fact that his evidence for actual conflict-management situations was largely hearsay.[20] A British colonial administrator who worked among the Nuer

17. Laura Bohannan, "A Genealogical Charter," *Africa, 22* (1952), 301–15.

18. See Clyde Kluckhohn, "Anthropology in the Twentieth Century," in Guy S. Metraux and François Crouzet, eds., *Readings in the History of Mankind, I: The Evolution of Science* (2 vols. New York, Mentor Books, 1963).

19. Evans-Pritchard, *The Nuer,* p. 170.

20. Ibid., pp. 163, 173 f.

and was a close student of Nuer law suggests that Evans-Pritchard undervalued the leopard-skin chief's influence and persuasive powers.[21] Among the Chiga, another segmentary people, the "judge" (whose decision is not binding) hears the accounts of both parties; then he listens to the deliberations of an ad hoc "jury." When he is satisfied that he has heard everything of importance, he gives his decision, which will be followed if the parties agree to it.[22]

Frequently the third party is a tribal elder, as is the case with the Chiga,[23] the Tiv,[24] the Konkomba,[25] and the Lugbara.[26] Tiv elders are those who are learned in genealogical lore, and the younger men come to them for advice. The availability of such experts seems sufficient inasmuch as the elders feel no necessity for systematically imparting their expertise to others. Younger and less expert or less knowledgeable Tiv seem not to object to this; it is enough for them to know that, should need arise, there will be an elder who can answer the pertinent questions. There is no more reason for a Tiv to learn the complete tribal genealogy than there is for a resident of Illinois to commit the state statutes to memory. This, incidentally, is not a matter of nonliteracy being a bar to systematic learning and teaching; the vast amounts of knowledge that nonliterate people communicate orally and relatively intact over many generations demonstrate that such means exist even if the motivation to use them does not.

Although segmentary societies manifest little role differentiation, the need for genealogical expertise parallels the need for what in Western societies we would call traditional legal expertise. Weber contended that the growth of the legal profession was stimulated by a demand for special skills, above all for "the capacity to state clearly and unambiguously the legal issues involved in a complicated situation."[27] The fusion of genealogical expertise and law is even more interesting when we recall that law is the symbolic representation of a social structure. A third party in a segmentary society could no more resolve a dispute without genealogical ex-

21. P. P. Howell, *A Manual of Nuer Law* (London, Oxford University Press, 1954), p. 28.
22. Edel and Edel, p. 118.
23. Ibid., pp. 116 f.
24. Laura Bohannan, "A Genealogical Charter."
25. David Tait, "The Territorial Pattern and Lineage System of Konkomba," in Middleton and Tait, eds., *Tribes without Rulers.*
26. John Middleton, "The Political System of the Lugbara of the Nile-Congo Divide," ibid.
27. Quoted in Bendix, *Max Weber,* p. 414.

pertise than a U.S. federal judge could hand down in ruling without a good working knowledge of earlier decisions and the statutes. Both sets of symbols provide the respective societies with manageable, manipulable terms.

Many Tiv law cases hinge on genealogy;[28] therefore the availability of expertise is essential, and, in the belief that the problems being dealt with have determinate solutions, it is permissible to question an individual's genealogical knowledge. For the Tiv, the assumptions that above conflicting views of the moment there is a true and knowable genealogy, and that someone somewhere knows it, are beyond argument.[29] Again, we come up against the fiction of completeness—the belief, translated into genealogical terms, that beyond the uncertainties of the moment there is perfect and complete knowledge. That the fiction is one of genealogy does not make it any less a legal fiction inasmuch as the foundations for behavioral rules would crumble if the genealogical fiction were acknowledged. As we have seen, however, completeness is unattainable; no symbol system that purports to represent a portion of the observable world can achieve perfect success. (The only enduring symbol systems are mathematical systems, which are far removed from the forces of change.) Thus genealogical-legal systems are at the mercy of changing patterns of interaction that may render portions of them empirically irrelevant. Tiv genealogy is reciprocally related to the real world in which the Tiv live. In principle, present relationships receive their validity from a genealogy, which in turn is proved correct by the existence of these relationships.

This one-to-one matching, however, is an ideal that is only partially adhered to. In every case the search is for the applicable genealogy. If the genealogy does not fit the case a search for an alternative ancestry begins.[30] How, logically, can alternative genealogies exist? They can exist because no one is sufficiently certain of the "true" genealogy that alternatives can be ruled out. Alternative lineage patterns in fact exist, and this fact bestows discretionary power on mediators, just as alternative lines of precedent expand the discretion of a court judge. The inconsistent versions of a genealogy that are in general circulation—with the inconsistencies masked by piecemeal learning—permit ample latitude. It is, moreover, an observable fact that genealogies—rather, perceptions of them

28. Laura Bohannan, "A Genealogical Charter."
29. Ibid.
30. Ibid.

—do change.[31] They must change because Tiv society, despite its generally static quality, alters at the levels of specificity with which genealogy deals.

Significantly, the rate of change seems to vary *inversely* with the size of the units involved. Genealogies that validate the existence of large groups change slowly, for two reasons. First, genealogy changes with alterations in relative size, territorial distribution, and power positions, whose nature it is to change slowly; in addition, the perception of change is presumed to lag behind the event. Second, the number of persons involved, given the consensual basis of a system, prevents rapid change as if by fiat.[32] The converse also is true: the smaller the size of the groups the more rapidly genealogy changes, both because it must and because it can. There is a crucial congruence between this relationship and our earlier concentration upon the differences between small-unit complex core areas and large-unit simple peripheral areas.

The effect of this is twofold. First, the third party receives a measure of discretion because he must manipulate ambiguous symbols and there is apt to be disagreement about the precise meanings of the genealogical-legal symbols he will deal with. Second, expertise endows the third party with control over a society's legitimation processes. Because the choice of the third-party is made according to qualities of persuasiveness and mediative skill and ritual-symbolic status, the status criterion means, in effect, that the leopard-skin chief (or a comparable figure) possesses knowledge of societal symbols and has the skills to manipulate them to bestow legitimacy on present relationships. Even Evans-Pritchard acknowledged the mutability of Nuer lineage.

The time-depth recorded in the lineage is limited and is fixed at a few generations, which hardly is adequate for historical record. The lineage distance between groups seems to be strikingly similar to the political distance between them, implying that lineage is adjusted to hew closely to day-to-day power relationships. It also is likely that a lineage would cease to be part of a society's oral record if it ceased to have political significance. These considerations suggest that actual-descent records are a medium on which political relationships can work their will.[33]

These observations raise the problem of efficacy: The mediator changes

31. Ibid.
32. Ibid.
33. Evans-Pritchard, p. 246.

a society's socio-political map, but are these not simply changes after the fact, belated bestowal of blessings on the status quo? The relationship, in reality, is reciprocal; the decisions in the legal process are both effects and causes. As the former, they legitimate present relationships; as the latter, they exert influence on future relationships. Lineage is the idiom that expresses and directs social relations.[34] The next chapter will be devoted in large measure to an analysis of the way in which sanctionless law can act prospectively as well as retrospectively. Here we will say only that to the extent members of a society adopt the same symbols that are used by the mediator in conflict management, to this extent are apparently post facto symbolic changes projected into the world of future action.

Who really makes decisions? It seems not to be the mediator, for he can only cajole and suggest, but experts have an authority that far surpasses their tangible resources. Technically, decisions are made by the disputants themselves, but there is a critical nexus between disputants and the mediator. Although the mediator gives no orders, as a repository of vital knowledge he in fact directs those who come before him. The legal process is not, of course, the only nor even necessarily the primary agent of change; many different forces work to change present relationships, and these changes must be assimilated if societal integrity is to be preserved. The alternatives perceived in future decision-making will be structured in terms of the categories that have been inherited. Thus every decision, joining mediator and disputants, becomes a precedent for the future—just as every decision also is shaped by the alternatives that have been passed down through innumerable series of prior conflict-management situations.

The same processes can be seen at work in international relations, with one difference: international law has not suffered the fate that primitive law suffered when lineage was abstracted. In the literature, international law does not appear as simply a body of rules whose basic idiom (sovereignty) was excised. A much earlier start on a sociology of international law or on an autonomous field of international relations might have produced the same unfortunate result of separating symbolic manifestation from its behavioral referents. This seems to contradict the common critique of international law as irrelevant, but, despite marked differences of method and emphasis between international relations and international

34. Ibid., p. 212.

law, there is at least consensus that the two fields share some of the same concepts.

As lineage serves as a kind of touchstone for segmentary societies, relevant divisions in international relations have traditionally been made according to the criterion of "sovereignty." Although territorial sovereignty has come to be associated with specific norms, it also is a way of dividing the social environment. Even the general abandonment of the term by social scientists has not changed the frequency with which statesmen invoke it. Indeed, sovereignty was once the central concept of political science; its subsequent abandonment resulted from charges of reification and of differences between the requirements of participants and observers. Conceivably, ethology may provide it with the scientifically valid base it now lacks, but, even if this does not happen, sovereignty will be important if only because so many nonscientists continue to use it. For centuries interactor relationships on the international scene have been formalized in terms of sovereignty, for through it the actors received their status; they became states.

The concept also has undergone periodic shifts in meaning, which mark out its true legal significance. The world of "sovereign states" was preceded by the sovereignless and stateless feudal system, but it may be argued that the Pope and the Holy Roman Emperor, conflicting heirs to the mantle of the Caesars, were sovereigns at that time. This argument, however, seems sufficiently removed even from Renaissance understandings of the Middle Ages that it should not exercise too great a claim upon us. Feudalism, which was easily modified to accommodate a new form, the state, had made loyalty a bilateral relationship between vassal and lord, and without much difficulty at the lowest levels, allegiances were transferred to the monarchs of national states.[35] If, higher on the feudal ladder, problems were greater, it was only because, for all practical purposes, the only persons who were effectively bound by feudal contracts were the serfs.

After sovereignty within state boundaries had been established, a second modification occurred. Sovereignty changed from supremacy within a limited territory to a belligerant form of independence from external threats. Analytically, the process of amalgamation by which small political units form larger ones is always the same, whether feudal contract systems coalesce into nation-states or nation-states draw together into so-called

35. Brierly, *The Law of Nations,* pp. 3 f.

supranational communities.[36] Initially in both cases, sovereignty is transferred from old units to new ones. Furthermore, it is definable both in terms of monopoly control over a territory and in terms of the preservation of newly acquired power against the claims of a potentially hostile environment.

In another sense, sovereignty provides the criterion for identifying the proper units in a system, being a combination of attributes that, when possessed, confers system membership. When legal disputes arise, sovereignty determines legal standing and, in general, one's rights and duties. Although it may have proved inadequate as an analytic tool, its importance as a datum in international relations should be beyond dispute. Shifts in its meaning demonstrate not its allegedly transient and unreliable nature but, rather, its conformity with long-run changes in the way political actors behave toward one another. For example, before territorial sovereignty could function as a criterion, the old order of feudalism had to pass, giving way to the Europe—and eventually to the world—of nation-states.[37] A new conceptual framework, replacing feudalism, was required by the participants if they were to make any sense of new conditions.

As in the past, when sovereignty meant one thing and then another, it is used today with various meanings against revisionist arguments, which are more than arguments, really, for back of the polemical literature are political, economic, and social forces to which legal concepts eventually respond. Through the nineteenth and into the twentieth century, the discretion of states to do as they wished (traditional sovereignty) was predicated upon the virtual independence of each state. Today, economic, political, and military interdependence cast doubt upon the old view that a state's actions were nobody else's business, short of outright aggression. In truth, decisions, as Schelling says, are more nearly interdependent than independent; what one does affects all. There is, in consequence, tension and a time lag "between the facts of interdependence and the persisting claims of independence." [38]

Thus sovereignty seems to be a dangerous anachronism that must be redefined, and three particular aspects merit special attention: the non-

36. Deutsch, "The Growth of Nations," *World Politics, 5* (1953), 168–95.

37. Maine, *Ancient Law,* p. 99.

38. Falk, *Law, Morality, and War in the Contemporary World* (New York, Praeger, 1963), pp. 52 f.

sovereign character of various segments of technological development, the equivocal status of international organizations, and the growing international rights of the individual.

As for technological developments, treaties on nuclear testing and, more recently, on the peaceful uses of outer space demonstrate that, in some geographical and functional areas, the usual claims of sovereignty are diminished or nonexistent. In a sense, the test-ban treaty implicitly acknowledges that, despite the traditional rights a country can exert over its own airspace, winds and radioactive fallout can make our atmosphere an indivisible, toxic ocean that can wreak damage on all countries. The outer-space treaty was preceded by the treaty on Antarctica, a rare example of conscious rehearsal for a future legal problem. Only time will tell how valid the Antarctic is as a microcosm of outer space, but the important point is the recognition that claims of sovereignty can and should be abdicated in particular circumstances. The reasons for this are threefold. First, unlike the situation during the Age of Discovery and during the subsequent development of imperialism, the possession of territory is no longer the principal symbol of ultimate national power. Territory has been displaced by nuclear weapons (although, conceivably, space exploration may return the idiom to territory). Second, the gains that might accrue from territorial claims are uncertain at the moment and are likely to remain uncertain for a long time. Third, something can be gained from a minimal level of cooperation (e.g. the rescue of astronauts) insofar as technology provides an inadequate or uncertain foothold for individual states.

If sovereignty has been redefined in various spheres in terms of mankind rather than the terms of individual states, similar flexibility has been shown international organizations. The latter are now very clearly comprehended within international law,[39] although, according to the old notion of territorial sovereignty, they did not exist as legal persons. This is a new status, and the expanding nature of international organizations continues to inject a problematic factor into their legal position. There is no single body of law that governs the transactions of international organizations, despite their acquisition of a legal personality.[40] The time lag notwithstanding, we again see the gradual emancipation of sovereignty from

39. Marek St. Korowicz, *Introduction to International Law* (The Hague, Martinus Nijhoff, 1959), p. 329.
40. Ibid., pp. 329, 381 f.

the limitations of territoriality, an adjustment that has been made in the face of a contradiction between existing concepts and available legal categories.

Even greater problems have been posed by economic integration, especially in its most carefully articulated form: the European Economic Community. Clearly, such "communities" transcend the usual concept of international organization that has been developed from League of Nations and United Nations experiences. In terms of the old concept of sovereignty, the term "supranational organization" automatically removes the EEC and similar integrative experiments from the pale of international law, for international law—by definition—has been concerned only with relationships between states. Any entity that was not a state simply was not within its competence.[41]

Integration—whether economic or political, or both—constitutes a continuum rather than a boundary line, and there is a twilight area rather than a clear threshhold between semiamalgamated units.[42] The Common Market presents an immediate legal problem; neither the EEC nor its members will wait quietly on the sidelines until the law satisfies itself as to what they really are. In fact, this ambiguous situation is dealt with on a pragmatic ad hoc basis. It is impossible for some international lawyers to define a community such as the EEC;[43] for others, however, the problem is the perennial task of updating the law. Partly international organizational law, partly a mélange of social science and legal disciplines, the regulations that govern international integration are those of an ongoing experiment.[44]

At the opposite end of the spectrum is the individual, who after generations of legal neglect has become the subject of almost feverish international concern. Traditionally, of course, what a state did with or to its nationals was deemed nobody's business but its own.[45] The world chose not to see, or at least not take official note of, instances in which a state oppressed its subjects. In the eyes of the law the state was the individual's

41. Ibid., p. 219.

42. Deutsch, *The Nerves of Government,* p. 33.

43. Paul Guggenheim, *Survey on the Ways in Which States Interpret Their International Obligations* (Paris, UNESCO, 1955), p. 11.

44. Eric Stein and Peter Hay, eds., *Cases and Materials on the Law and Institutions of the Atlantic Area* (2 vols. Ann Arbor, Overbeck, 1963, prelim. ed.), *1,* iii–iv.

45. Brierly, p. 291.

only true protector, and a person outside a state was literally an "outlaw." It is conceded, even by proponents of individual international legal rights, that individuals' claims for protection by the international community usually run counter to prevailing doctrine. Even those who have conceded that an individual may have rights apart from those his state chooses to recognize and honor regard these rights as conspicuous exceptions to the general rules of international law. By and large, a person's legal personality is subservient to states' policies.[46]

Exceptions exist, nevertheless, and have been growing at a rapid rate. A relatively new category of individual acts provides that individuals shall be held responsible for them—the so-called crimes of international jurisdiction. Originally they included piracy, white slavery, and espionage, to which modern history's contributions are war crimes and crimes against humanity. The last, firmly established by the Nuremburg Tribunals, was the result of a long development. The doctrine of individual responsibility was shaped by behavioral patterns, not by legal fiat. The perverse litany of international crimes provides a dolorous history of our era. The criminal-law by-products of war, first crystalized at the end of World War II, drew on ideas that were well developed in the interwar period.[47]

These extensions into the individual realm began with perceptually conspicuous events, events that seemed to be unprecedented. They not only ran against the grain of nineteenth-century optimism and its faith in human progress but they implied the irrelevance of a law that was based upon these beliefs. Perceptually dominant events are, by their nature, exceptional. At the symbolic level they emerge as exceptions to rules. Ultimately, the repetition of events causes the exceptions to form new rules. Extended individual responsibility in crimes against humanity had its origin in a series of events, which statesmen and publics perceived as atrocities, that occurred shortly before and after 1900: King Leopold's administration of his Congo "estate" from 1885 almost to 1908, the Tsarist pogroms of 1882 and 1903, the massacre of Christians in Armenia and Crete by the Ottoman Turks between 1891 and 1896, and the Turkish massacre of Armenians in the closing days of World War I.

Exceptional legal status had to be granted in two directions: to the perpetrators, so that an outraged sense of justice could be satisfied, and to

46. Korowicz, pp. 342 f.

47. Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, University of California Press, 1959), p. 419.

the survivors. Such cataclysms, and indeed war itself, created streams of refugees who were swept outside the jurisdiction of their native states. The legal crisis was aggravated by World War I's and the interwar period's creation of large numbers of stateless persons. These persons could not be fitted into the framework of international law,[48] but the existence of so large a group of out-laws debased the existing system by limiting its practical applicability.[49]

The League of Nations, with its "Nansen passports," made a beginning toward redressing the individual-state balance, but the continued existence of individuals who had no legal rights or status gave impetus to the introduction of further exceptions to the rule. The United Nations Charter and subsequent human rights conventions under the UN's aegis have recognized individual legal rights to an extent that had never before been imagined, let alone implemented. It is a painful irony that international law should forever talk about "legal persons" but seldom pay attention to *persons;* but the eighteenth and nineteenth centuries, in which international law evolved, recognized no need for such rights. Where such a need is not recognized it is useless to suggest reforms, for they will be only paper reforms. Despite the frequent lag between pronouncements and practices in the contemporary history of international human rights, it must be emphasized that even entertaining the thought of individual rights is an innovation.

What consequences do such changes have for sovereignty? The large areas of exceptions with respect to individuals stem from empirically verifiable causes. It is obvious—as it was not in a world of stable state power—that the individual plays critical roles in the world-power process as a creature of multiple loyalties and decisions.[50] In terms of sovereignty there are two effects. First, state sovereignty is being intruded upon, slowly. It is still the minimal attribute that grants integrity to the principal actor in international politics, the state, but this view must coexist with a steady shrinkage in the areas within which other states grant a single state full discretion. Non-state actors—international organizations and

48. Hannah Arendt, *The Origins of Totalitarianism* (2d ed. New York, Meridian, 1958), p. 284.

49. Ibid., pp. 267–90.

50. See Myres S. McDougal and Gerhard Bebr, "Human Rights in the United Nations," *American Journal of International Law, 93* (1964), 603–41.

individuals as individuals—demand and receive sufficient world attention that every state must at least acknowledge their presence and the legitimacy of their multiple political roles. The salient international unit still is the state, the sovereign corporate person, but it also exists in the guises of a member of international organizations and a collectivity of individuals. It no longer has a unique role.

Second, and as a corollary, sovereignty no longer fulfills the venerable function of a criterion. Some fictions have helped bring this about: namely, that international organizations partake of the attributes of their state members, and the "exceptions" that continue to be justified in the area of individual rights. As a result of these fictions, non-state actors have legitimately entered the international system. Sovereignty, instead of signifying only the areas in which a state can do whatever it wishes, also implies the possession of legal status and rights and duties. The old notion of state sovereignty is no longer a monopolistic concept that effectively limits legal entry to those who effectively control large land areas. The new and emerging concept of sovereign rights is beginning to attach itself on a nonterritorial basis. Once, Maine tells us, monarchs were kings of people, not of land; later, in the Middle Ages, they asserted their rule over territory.[51] If that is so we have come full circle.

How do these changes affect conflict management? We have considered some of the modifying effects on sovereignty: law seeks to develop concepts that will organize previously unpatterned or inadequately patterned empirical data. For all its seeming remoteness, law flourishes to the extent that it ties itself to human action. The successive modifications in sovereignty parallel successive modifications in the distribution of political power.[52] The growth of norms from modal events (similar repeated acts) makes the determination of factual situations a pivotal event. If customary law grows out of "what happens," to know what happens and what has happened is to reach legal roots.

Precedents do not spring forth full-grown; rather, they encapsulate a chain of events and, in so doing, grow slowly to normative status. Only as events accumulate in related clusters does order appear. Custom is created out of general adherence, and only then do once-neutral events have the power to change the direction of present and future acts. It is a strange,

51. Maine, pp. 100 ff.

52. Charles De Visscher, *Theory and Reality in Public International Law* (Princeton, Princeton University Press, 1957), p. 101.

unfamiliar process by which acts of states change from statements of fact to statements of value [53]—very unlike our conventional concept of legislation. This places "principle" in an awkward position. The nexus between event and norm means that it is precarious to step beyond carefully defined areas of majority practice and describe a conflict in terms of overarching principles of law or justice without regard for the tenuous connections these principles may have with behavior. It is for this reason that "package settlements" of international disputes rarely succeed. The attempt to classify an entire series of incidents under a single magisterial rule makes sense in an American appellate court but not internationally, where the more portentous and more general the rule the more difficult its correlation with behavioral sources. For this reason the piecemeal solution of small problems through modestly constructed rules is a sounder procedure.[54]

Despite appearances, much of the International Court of Justice's decision-making hinges upon decisions on facts. The court has refrained from giving creative judgments that fill up the gaps in the law,[55] which is important less for what it tells about the court than for what it tells about international law. The necessity for narrow constructions focuses attention on the particular at the expense of the general. A former court justice observed that, whatever the text of a judgment reveals, its direction was first guided by "an objective analysis of the details of the matter in dispute." [56] Although we may quibble about the meaning of objectivity in this context, it suggests that minute analysis of what are perceived as facts precedes the technical manipulation of rules that are incorporated into the end product.

International organizations have managed disputes openly through their techniques of gathering and construing facts. An especially vivid example of this is the International Commissions of Inquiry of the League of Nations—fact-finding groups that were fairly successful in forestalling or moderating violence.[57] Although the system was not made part of the United Nations,[58] the Security Council has retained broad investigative

53. Ibid., p. 148.
54. Fisher, "Fractionating Conflict," *Daedalus, 93* (1964), pp. 910–41.
55. De Visscher, pp. 336 f.
56. Ibid., p. 353.
57. Julius Stone, *Legal Controls of International Conflict* (New York, Holt, Rinehart, and Winston, 1954), pp. 171 f.
58. Ibid.

powers.[59] And the unforeseen development of the Secretary-General's role seems to be in the direction of establishing common definitions of conflict situations.[60] Before any questions of what should be done or what the law is comes the more basic query: What is really happening?

We have spent a good deal of time on international aspects because, paradoxically, we can be much less clear about what is going on internationally—we are too deeply immersed in world events to see them with the clarity of an ethnographer. Entrapment in past and recent history also makes it difficult to deal with the international sphere, and we cannot help but interpret things in terms of how we would like them to be. Indeed, "sovereignty" and "state" and "treaty" are pigeonholes into which sense data are sorted. Again, facts do not lead independent lives; they have significance only by their grouping according to concepts, and then by the juxtapositions of concepts. International law provides a repertoire of these conceptual tags and their application helps give definition to a situation in which choices have to be made. In triadic interactions, this task of defining a situation belongs to the mediator, whether the mediator is an individual operating ad hoc or whether (in the rarest cases) an international tribunal is involved.

As we have seen, the shifts in the concept of sovereignty indicate the responsiveness of the concept to behavioral changes and its continually uncertain and ambiguous nature. Indeed, the anomalies of international organizations and individual rights are in themselves sufficient indicators of ambiguity, obviating recourse to such additional problematic matters as extraterritoriality and expropriation. The normative outcome in an international dispute is directly determined by its structure, that is, by the arrangement of the facts of the case; and the vocabulary of international law is sufficiently widespread that most decision-makers think of problems in legal terms. Of course, the influence of formal legal advisers may be very slight, but the vocabulary of diplomacy is composed of legal terms, however much those who use them may think they are talking politics rather than law. Because fact-configurations are conceptualized in terms of an international law vocabulary, the ability to use this vocabulary crucially influences results.

International legal terminology is to the management of international

59. H. Lauterpacht, ed., *Oppenheim's International Law* (7th ed. 2 vols. London, Longman's, Green, 1952), *2*, 103 f.

60. Snyder and Robinson, *National and International Decision-Making,* pp. 150 f.

conflict what kinship terminology is to conflicts in segmentary societies. Both are symbol sets—in the very broadest sense, the "idiom of segmentation." Where integration creates complex and shifting social relations, the manipulation of legal concepts has three consequences. First, it legitimates the present distribution of power. Second, it legitimates selected exceptions to a common practice, and, through the careful classification and accretion of exceptions, prepares the way for new patterns. Third, and most important, it indirectly alters the alternatives that are seen to be available. Such manipulation is tantamount to fact-classification, the sorting of data into a few conceptual pigeonholes. There are consequences of this classification. Whether an incident is an aggression or a civil war seems to be a factual matter, but who can deny that there may be drastic implications for statecraft in the distinction? There is in this, as in other forms of symbol manipulation, an element of expertise. As a tribal elder brings lineage expertise to bear, an international lawyer or diplomat or civil servant uses his special knowledge to give structure and meaning to events.

We have been dealing heavily in particulars whose ramifications extend to law in the most general sense. Because the appellate levels of the American judicial system are highly visible, we tend to think of the entire judicial process in appellate terms, preeminently as choices among competing legal rules. But in the overall system, as Jerome Frank emphasized, judges avail themselves of two types of discretion. The first is *rule discretion,* which is made necessary by the equal legitimacy with which several rules can be applied to a single case. At the trial-court level, however, a second variety comes into play (rather less discussed): *fact discretion.* The appellate courts rarely interfere in a trial judge's construing of what has happened. Despite the preciseness of legal rules, the ambiguity of facts gives enormous power to the individual who has the job of arranging them in a coherent whole.[61]

The fact-finding process is not limited to courts; it is an integral part of law in all of its manifestations. There are many different ways of finding out what has happened, for any number of purposes: the social scientist will find facts one way, the lawyer another. The latter's approach is characterized by the need to cast problematic occurrences into a definitive mold: a thing has taken place or it has not; there is little room for official

61. Jerome Frank, *Courts on Trial* (New York, Atheneum, 1963), p. 57.

uncertainty.[62] The necessity of fact discretion has two sources. First, there are never enough data; a definitive collection of facts is an ideal, not a reality. The flow of adventitious events and the fallibility of memory cloud the picture for subsequent inquiry.[63] Second, even the assembly of a sufficient number of undigested facts into a coherent picture is bound to be problematic; the Warren Commission Report and the subsequent critiques are an object lesson in this regard. Available data, cultural values, and the necessity for communications links at every step place limits on the number and kind of plausible fact configurations. In almost every case, no single arrangement is so overwhelmingly persuasive that it precludes alternative formulations.

The legal process in part consists of a series of matchings of fact configurations and norms. Facts and logic come together because facts must be assimilated to a category before norms can be applied. In the absence of facts, law serves no purpose.[64] The matching can then proceed in either of two directions: (1) an established fact-situation can be matched with one of several norms (the familiar process of rule discretion); or (2) a particular norm can be indirectly invoked by a choice among competing versions of what happened (i.e. fact discretion).

Our earlier discussions of lineage and sovereignty manipulations can now be seen as instances of the important position of fact discretion in primitive and international law. In this connection it is important to recognize the necessity for doing more than collect data; the data must be organized into meaningful versions of events and a choice must be made from these versions. All of the data are never, and can never be, gathered. Even the ideal "all data" depends, paradoxically, upon criteria of inclusion and exclusion: Does this, in a homicide, include sunspot activity? Even if we rule out presumably irrelevant variables from a given mass of facts, different combinations can be made, and it is in this area of arrangement and final choice that fact discretion lies. "In the field of law, lawyers know that if you get the judge to see the case as falling into the pigeonhole you have chosen, your case is half-won." [65]

Reality is a seamless web whose strands are susceptible of an indefinite number of divisions and classifications. The facts and circumstances that

62. Aubert, "Researches in the Sociology of Law."
63. Frank, pp. 14–36.
64. De Visscher, p. 79.
65. Edel and Edel, p. 140.

are available to peoples and to governments in regulating their social relationships are open to multiple arrangements. Events that are related for some purposes may be divided for others. Conflicts do not have "objective edges" that allow us to say: "This and nothing more is what the fighting is about." "This and whatever else we choose" would be more accurate.[66] If we seem to be manipulating facts, we confess we are, but only because it is part and parcel of human finitude and of the multiplicity of human purposes. One's only choice is to make choices.

Thus the explicit mediator is an expert whose expertise is pressed into the service of conflict management, but the conventional image is that of a judge who decides between right and wrong. As a matter of fact, the leopard-skin chief is not very interested in guilt or innocence—only in repairing ruptured social relationships. This is a supremely practical view, amoral only in our immediate sense but always subject, for the participants, to the higher morality of the society's survival. Notions of right and wrong may be shared and a common morality may be one of the defining criteria of a society, but there are insuperable obstacles to moral judgment in multicentric societies.

Philosophy informs us that value judgments can yield to persuasion but not to testing because there may be community consensus but not intersubjective verifiability. The latter marks the preserve of facts, of statements that can be validly tested against features of the real world. It is important to recognize that this distinction is not limited to discussions of the scientific method, which ordinarily is thought to be its exclusive residence. Intersubjective verifiability may be a canon of science but it also has a place in the everyday world. Indeed, the assumption of intersubjective verifiability is one of the foundations of the commonsense world of social relationships.[67] We incarcerate in asylums persons who hear and see what is nonexistent for everyone else. Multicentric societies, such as those we have been discussing, spread physical sanctions so uniformly that every actor has equal power to impose his value judgements, which is to say that no one has such power.

It is pointless, therefore, to talk about rule discretion in such a setting. Each member is not only his own judge but, through self-help, his own policeman. The absence of central decision-making precludes the render-

66. Fisher, "Fractionating Conflict."

67. Alfred Schuetz, *Collected Papers, II* (The Hague, Martinus Nijhoff, 1964), p. 31.

ing of authoritative normative decisions when an issue revolves around a choice among rules. Who is to say whose choice is right? There is no way of imposing a solution, nor, for that matter, of persuading every other unit in the society that one's own view is correct. The authority of one member is equal to the authority of another. Clearly, then, the rule enunciating model of law to which we are habituated is at odds with the social structure. The same limitations that make tribal or international legislation almost impossible make judicial legislation equally out of the question.

Fact-discretion suggests a way out of the stalemate. By its dependence upon the valid principle of intersubjective verifiability it makes the limitations of sanctions and persuasion irrelevant. The classification of facts on the basis of societally shared categories is grounded in empirical reality—in the version of reality that is accepted by the participants. Norms are inferentially attached to each fact-category. The fact concerning the genealogical distance between the killer and his victim invokes appropriate consequences, just as the finding of civil war on the international scene brings a particular set of international rights and duties into play. Just as every legal system has its fiction of completeness, every folk epistemology has its "fiction of definitive truth": that there is only one true version of any event or set of events, be it the loss of cattle or the start of a war. Of course, the epistemology of one society may not fit another,[68] but in every society a dispute is believed to be traceable to an indisputable account of what happened, however much this ideal may elude the investigators. It is beside the point whether, from a philosophical standpoint, one accepts the validity of definitive truth in securing a narrative of events; the primary, significant point is that it is believed by those who are involved to be a valid principle.

The fact-value dichotomy, which serves as a starting point, divides along the line of intersubjective verifiability. But this does not fully suffice; for one thing, it assumes its own cross-cultural applicability. Every culture has its own logic,[69] but each may differ from the others. Cross-culturally, the division is between spheres of competence. In what circumstances is each man's judgment as good as another's? In what circumstances is the weight of evidence deemed overpoweringly obvious to all? This may or

68. Northrop, "The Epistemology of Legal Judgments," *Northwestern University Law Review, 58* (1964), 732–49.

69. Goodenough, *Cooperation in Change*, pp. 150 f.

may not coincide with our own notion of where facts stop and values begin. In our system the judge is competent to construe the facts and to evaluate them, and he can also choose between values—although we tend to assign different tasks to different levels in our judicial system. In horizontal legal systems, because of the absence of legislation, the pool of applicable norms is relatively small and stable. The diffusion and dilution of authority gives an individual real authority only in the area of fact expertise; the expert does what we acknowledge is beyond our skill.[70] Because rule-making and rule-choosing skills are equally distributed in a multicentric society, there must be a kind of standoff in these areas. But this is not always the case with fact-related skills.

In the most simple societies or the less complex outer reaches of a society, implicit mediation is the standard procedure. In such settings every actor can be his own expert, both in values and in facts. His perceptual horizon is so relatively uncluttered that he and his opponent can organize the available data in similar ways. Norms then follow from each act of organization, permitting the probability of coordinated actions. Seeing situations in the same way permits the dovetailing of decisions, upon which implicit mediation depends. As a society becomes more complex, however, more functional specificity is in order. Sense data cannot be as readily organized, and uncoordinated classification as likely as not will lead to uncoordinated actions. Prediction becomes more uncertain and the luxury of investing the entire legal process in each actor becomes increasingly costly, only to end in the disorder and randomness that law intends to avoid. If people do not share the same categories or if they apply the same categories differently, the results can be utterly bewildering in their diversity. Contradictory propositions seem to flow with equal ease from the same events.[71]

The explicit mediator is the expert and, like all experts, he does what the rank and file is no longer able to do. In this case he manipulates the framework of law in order to manage conflicts. He solves problems, both symbolically and empirically, and the symbols he manipulates are more closely related to what has happened than to what should happen. It is simplistic to imagine that the third party always manipulates norms to fit the facts, something that is solely the province of unicentric societies. This

70. George A. Kelly, "The Expert as Historical Actor," *Daedalus, 93* (1963), 529–48.

71. Goodenough, p. 156.

view assumes the unambiguous character of the facts and implicitly rejects fact-discretion. It also assumes that the overt choices among the "oughts" of society will be accepted and adhered to. But decision-making can run in the opposite direction as well, from facts to norms. The manipulable framework is more than simply normative; it is a means of construing facts so that norms seem to relate to them inevitably, without the mediator having done anything to force a value choice. If we see norms as constant and facts as moving, a decision to stop a patterned flow of facts will juxtapose the facts with a norm, without appearing to have manipulated norms. Norms, internationally and tribally, are sacrosanct, but facts are not, despite the obvious normative consequences that flow between the two poles.

Thus the explicit mediator is an expert in manipulating the symbol system of the law, or, rather, the part that classifies and arranges facts—the framework of concepts by which his society organizes its social relationships. The multicentric nature of the society permits him fact-discretion, which allegedly is based upon superior technical skill. However, it denies him blatant norm-discretion, which rests upon alleged personal value decisions. There is failure to recognize that the results frequently are the same whether facts or norms are the starting point.

The appearance of mediation increases with societal complexity,[72] and Schwartz and Miller have advanced four tentative explanations for this relationship. First, societies that do not have explicit mediation are smaller than societies that do. Perhaps fewer disputes develop, so that the need for direct mediation is quantitatively less. Second, informal social pressures may create conformity before formal mechanisms are required. Third, among many primitive peoples the struggle for physical existence places such a high premium on group solidarity that intragroup conflict would be suicidal. Four, the absence of property and a money economy may eliminate a major cause of conflict, making explicit mediation superfluous.

We will add a fifth possibility. As a society grows in complexity its ideas about itself also become more complex. What we have called the indigenous conceptual framework becomes more complicated. It is harder, then, to utilize the symbols that purport to tell the relationship an individual or a group has vis-à-vis other individuals and groups. Because it is

72. Schwartz and Miller, "Legal Evolution and Societal Complexity."

through the manipulation of this framework of symbols that courses of action are determined,[73] manipulation is necessary for action. Manipulation can exist independently of courts, lawyers, or police, but sometimes it requires at least an element of expertise. If a society is sufficiently simple to allow the manipulation to be performed ad hoc for and by whatever parties require it, it employs implicit mediation. A more complex milieu multiplies the inferences that can be drawn and the number of possible discontinuities between the symbols and the elements of the world they are supposed to represent.

Transferred to the systems that we have been considering, explicit mediation occurs in the parts of a segmentary lineage society that are *least* segmentary in character, where the separations between groups are least simple and distinct. It is most prevalent in an international system in which the state is least prominent—where international organizations, supranational communities, and individuals becloud the picture. Thus the explicit mediator pursues his dialectic of evidence and inference in the area between implicit mediation and centralized decision-making. He operates without physical sanctions but he posseses the symbolic means for legitimating action. He is the custodian of a symbol system that can be manipulated successfully only by experts, and he uses his expertise in the service of social stability.

In summary, the solutuions to a problem may depend upon the way the problem is put. Courtroom lawyers spend much of their time vying for the most advantageous ways of construing their cases. This is obscured, however, by the very real authority the courts possess to select and to formulate rules for themselves. At most, the lawyers' only advantage is making the scope of alternatives somewhat more narrow and precise. In a very real sense, however, the setting of a problem governs its solution, especially if the solutions (the "oughts") are deemed to be beyond the interference of individuals.

There is, in consequence of this, ambiguity at two levels: a blurring of the line between problems and solutions and a related blurring of the distinction between facts and values. The former, however, can be verified or disverified, but the latter yields only to sufficient powers of persuasion. What often goes unnoticed is the extent to which facts select values—at least in social settings in which the two are presumed to be related. The

73. Goodenough, p. 149.

law is one such setting, assuming—even in the if-then structure of rules—that the "bias" of the facts guides the selection of consequences and obligations.

The overriding fiction of both international and primitive law is that it is permissible for individuals to manipulate symbols that stand for facts (because they are intersubjectively verifiable in principle) but it is impermissible for them to manipulate symbols that stand for "oughts" (because a customary system has no clear locus of legislation). No matter that the first activity leads directly to the second or that, once the existence of legal rules is acknowledged, fact and value cannot be severed. It is this fiction that permits the explicit mediator to function, accepted as impartial fact-finder but not (in the usual sense) as impartial judge. It is enough that he gets both sides to agree on what has happened, which is testimony that the senses are regarded as the universal validator. This also is testimony to the fact that, in particular circumstances, the construction of events, although in principle within the competence of all, is in practice a matter that is better left to the experts.

It is no small thing that men utilize symbols. After there is agreement on the symbols, those who interpret their meanings become figures to reckon with. Accordingly, the adepts of the law—those who are trained in its techniques—effect decisions incommensurate to their numbers or tangible resources. And the law, as a symbol system, more or less leads a life of its own, dependent for its continued existence more on social acceptance or acquiescence than on grandiose legal institutions.

8. The Uses and Limits of Law

Ethnocentrism is perhaps an excusable prejudice but a prejudice nonetheless, and in no endeavor is it more disruptive than in the systematic comparison of whole societies. Our intellectual impedimenta consist not only of overt prejudices but of camouflaged and unarticulated epistemologies as well, making it all but impossible to view every society with an unblinking eye. The anthropologist's contention that "the fish doesn't know the water" may have merit, but, if taken to its logical conclusion, it makes the systematic study of man a fruitless undertaking. Unfortunately, every human activity is subject to such a withering critique, and each is based upon the unassailable fact that our standards forever outrun our research means. If we admit the desirability of social science despite our limitations—as I think we must—we must perforce learn to expect, to welcome, the unexpected. We must grow accustomed to finding sudden mirror images of our own society in the most exotic tribes and, conversely, to many jarring manifestations of the bizarre and "primitive" in that which is closest to us and most familiar.

There has always been a strong element of presumption in excluding a society from the realm of law. Law then becomes what we—in what we believe are favored circumstances—choose to call it. Although, ultimately, all things *are* called what we choose to call them, more is involved than mere labeling. It is necessary and proper to apply conceptual tags, without which discourse is impossible, but the criterion for applying them must be something other than whim. The preceding chapters, which attempted to portray law at a sufficiently abstract level that it was free of culture-specific elements, were counterpointed by some specifics of international and primitive law. The abstraction can be applied to any society, where it is modified and enlarged upon according to the lights of the particular culture. Thus various elements of the legal subsystem are uniform from society to society and others are polymorphous. Law has its constants and its variations; unfortunately, we know much more about the latter than about the former. It might, therefore, be worthwhile to sketch some of the constants as they have been developed in earlier pages.

At least half a dozen "legal universals" are found in all societies. This means that they occur both in the multicentric/horizontal systems, which have been the primary focus of our attention, and in the generally unicentric/vertical systems, with which we are brought into contact in daily life.

1. Law is a set of interrelated symbols.
2. Legal symbols have *some* empirical referents.
3. The symbols can be manipulated and can be arranged in propositional form.
4. The legal process involves the correlation of fact-situations and normative outcomes.
5. Law as a symbol system is a means of conceptualizing and managing the social environment.
6. The legal process involves the transformation of dyadic interactions into triadic interactions.

These are six formal characteristics of theory, as opposed to specific findings in a real-world society. All of these characteristics will be found in every society, but all are subject to modifications.

This brings us to the polymorphous qualities of law.

1. The set of legal symbols will be more or less complex, varying directly with the complexity of the society.
2. The empirical referents may be at variance with the symbols, the time lag varying directly with the complexity of the society.
3. The more complex the symbol system the greater the number of possibilities for manipulating it, and the greater the required manipulative expertise.
4. The more complex the symbol system the more ambiguous the fact-situations the symbols express. The direction in which the legal process moves—from fact-situation to norm or from norm to fact-situation—is a function of societal complexity.
5. As societal complexity increases the conceptual framework for managing the social environment becomes distinctly separate from other conceptual frameworks (i.e. with the development of separate institutional spheres of religion, law, politics).
6. As societal complexity increases the third party becomes concretely as well as analytically separated from other actors. The movement is from implicit to explicit mediation.

To some extent, all of these areas of modification can be found in the primitive and international systems we have examined.

At the risk of adding superfluous detail, it might be well to be more specific about the manifestations of the six polymorphous features in seg-

mentary lineage systems and in international relations. We have, of course, been moving downward on a ladder of abstraction, from legal characteristics in their most general and least culture-specific form to a restatement in terms of the ways in which they can vary in specific milieus. Now we take a further step, as we consider the peculiar forms of the legal characteristics in two sample environments.

In segmentary lineage systems the pattern is approximately as follows:

1. As interactions increase in frequency, the genealogy that purports to describe the social relationships becomes more complex.
2. Changing power relationships, segment size, and spatial distribution throw the genealogy out of phase with the real world.
3. In peripheral reaches of the society, intersegmental relationships are viewed simplistically—more as a clear-cut matter of "we" and "they" and less in terms of potential cross-pressures. In areas in which lineage relationships, perceived proximities, and economic interdependence are greater, the genealogical-legal symbols are too difficult for successful manipulation by any of the actors ("success" being judged in terms of actions that lower the level and scope of violence and preserve the equilibrium of the system).
4. Events described in the latter part of No. 3 (above) present situations whose attendant facts can be construed in various ways. The explicit mediator's task is to construe facts authoritatively (but with the necessary normative consequences) because the absence of powerful chiefs prevents the direct and authoritative propagation of norms.
5. The "spinning off" of a separate, specific legal system will not be found in the primitive societies we have studied. This is an apparent difference between segmentary and international systems, but the explanation is fairly obvious and will be considered later in the discussion of international relations. Some primitive societies have explicit and identifiable legal systems, but they are not to be found in more or less pure segmentary lineage systems.
6. Symbolic and perceptual simplicity permit segments to make adequate predictions about each other's behavior (implicit mediation) but symbolic and perceptual complexity require something more: a person who acts as third party (if only on an ad hoc basis), performing legitimating rituals and solving legally relevant genealogical problems (explicit mediation).

Application of the six principles to the international system yields the following results:

1. As international interactions increase, their descriptive concepts (most of them nominally lodged in the field of internationl law) become more complex.
2. Changing power relationships and interactional flows among states, international organizations, and individuals throw international legal concepts out of phase with the real world.
3. Intersystemic relationships, if characterized by fewer transactions, present fewer options. On the other hand, intrasystemic relationships are conceptualized in a sufficiently complex way that the actors are prevented from successfully manipulating international legal concepts without expertise from outside the system.
4. In situations described in the latter part of No. 3., the facts in an international dispute can be construed in a number of ways. It is the task of the explicit mediator—a third state, an individual operating ad hoc, or an international organization—to construe the facts so that they warrant a particular outcome, because the mediator lacks sanctions and the authority to independently choose or decide upon the proper rule.
5. The autonomous character of international law (having its own lawyers, tribunals, law books, etc.) derives from the fact that although international relations are stateless and multicentric in structure, the constituent units (states) are legally much more complex than any segment of a primitive society. There are, consequently, exchanges of ideas and persons between highly developed municipal law systems and international legal systems, which give the latter a municipal-law appearance.
6. Interactional nodes also become loci for explicit mediators, for example, in the United Nations (a site of high diplomatic interaction) or the Common Market (a site of high economic interaction). The symbolic correlates of such transactions are too complex to be handled without expert intermediaries.

All of these observations apply directly to societies that do not have the means to legislate new norms, repeal old norms, or muster police power against deviant behavior. Norms arise from behavior; as behavioral patterns fall into disuse, the norms become anomalous. Their frequent resort to violence on a self-help basis notwithstanding, these societies diffuse the

use of physical force rather than centralize it in governmental institutions. There is a "free market" in the use of force, but, like the free market in economics, the end result is self-regulation rather than chaos. For some types of behavior there are positive, built-in sanctions—incentives for conformity—from which can be inferred various negative built-in sanctions against nonconformity. In any event, we hope the foregoing chapters have established the existence of societies in which order is preserved entirely without the paraphernalia of courts and police.

It may be argued, however, that such a system is merely a collection of words—a group of rules that receive the breath of life only through the vivifying power of the state. Such "systems," then, would be meaningless intellectual exercises. Or they could be systems that tranquilize the participants but are completely removed from the wellsprings of social action. Such an answer begs the question, however, for it creates more mystery than it dispels. If the activities we have described are thought to be nothing more than pious gestures, significant numbers of people and much time and effort are employed in pious elaboration and manipulation of ideas and in pious performance of ritualistic activities.

An underlying thesis of this study is that activities that apparently are devoid of function or meaning seem so only because they are viewed in the perspectives of our own culture. As we have seen, the function of law in the most general sense is *to make human actions conform to predictable patterns so that contemplated actions can go forward with some hope of achieving a rational relationship between means and ends.* Again, we return to the concept of constant and polymorphous elements. Performance of the principal function by the legal system in one setting does not bar it from performing additional functions in other settings. In segmentary lineage systems and in international relations, virtually the entire legal apparatus is turned toward the achievement of the principal end. In municipal legal systems there is no reason why this cannot be done in concert with additional but related functions, such as legislation. In other words, additional features can be added to the original legal core—much as Hart suggests that the secondary rules in developed societies are superimposed upon the primary rules of obligation.[1]

Thus law can retain its minimal function of ordering the social cosmos while it performs such additional duties as seem necessary and desirable for creating and implementing policy. The resources that a state can free

1. Hart, *The Concept of Law,* pp. 77–96.

for use as sanctions means that the range of activities that are susceptible to legal action can be increased and the rate of deviation can be lowered. We do not assert that horizontal law necessarily has anything to do with justice, either in our own terms or in those, for example, of a Tiv tribesman. Indeed, the recurrent disillusionment that grips international law [2] is traceable to the gap between law-as-order, which is attainable, and law-as-justice, which often is not. The recognition that the gap frequently is unbridgeable and that law and justice are separable is a bitter pill, particularly in a society such as ours, where the law is generally revered.

In any case, it is not clear how many additional functions law could perform with the state's resources. The deterrent effect of sanctions is currently problematic, both as to the kinds of acts deterred and the types of persons upon whom deterrents work effectively. Further, the degree of deterrence that could be achieved at any point by a particular increment of sanctions is unclear. Law, at least potentially, is multifunctional, our current uncertainty over the total potential notwithstanding. Law orders social reality in all societies, but in some it can be used to secure obedience and to innovate in reaction to challenges to existing values. An eventual typology of all legal functions ought to be scalable; that is, a system capable of, say, innovation is deemed capable of performing a whole series of lower-order functions.

Sanctions, consequently, may or may not be appended to the formal, symbolic structure of the law. When they are present, the law may perhaps perform at levels and in substantive areas that previously were beyond its normal abilities. But the presence or absence of conventional sanctions is a function of societal structure, and sanctions are separable from the question of whether the core law itself is present. The societal structures we have examined manifestly lack the infrastructure that sanctioned law requires, but, however lamentable we may find this situation, the sanctionless mechanisms of implicit and explicit mediation continue to operate in their own ways.

A much more trenchant criticism can be leveled against these ideas (we have already touched upon it): perhaps what we have been talking about is merely post facto rationalization that masquerades as law. This is a double problem because of the absence of deterrent sanctions that might

2. Julius Stone, *Quest for Survival* (Cambridge, Harvard University Press, 1961), p. 8.

seem to ensure prospective effects. And is not "mediation" only a hollow sanctification of whatever happens to exist? The matter is further complicated by the apparent difference in the sequential operations of implicit and explicit mediation. The former, by the constant internalization of systemic values, seems to exert its influence in the present moment, at the point of decision; the latter seems to operate only after a fait accompli.

In answer, we must pay due respect to the sanctification of the status quo, which is no more than legitimation, the bestowal of societal approval upon an action or state of affairs. The practice is in no way peculiar to horizontal legal systems. When our Supreme Court strikes down a libel judgment against a newspaper that has criticized public officials it, in effect, communicates its retroactive approval of the actions to the press. We constantly speak of the necessity for the law to "catch up" with what people are doing, to eliminate the lag between positive and living law, which is simply a bestowal of legitimacy on a particular range of human activity after the fact.

American law, however, does much more than legitimate what has long existed in an illegitimate state; it also works in the present and in the future. By altering legal relationships the courts push into new areas of conduct, moving from retroactive approbation or condemnation to prospective ordering, from the past through the present and at least to the short-term future. When we say a decision sets a precedent, we imply that judges who in similar cases ignore the precedent will do so only at their peril; and citizens should take the precedent as notice of the way in which their own corresponding cases will be disposed of.

To what extent can horizontal legal systems operate along a temporal dimension? Whenever a choice must be made only a limited number of alternatives is available. The choice of a stable government's reaction toward a revolutionary government depends upon a range of alternatives, all classified under familiar rubrics, such as recognition, severed trade relations, war, etc. In any case, options are soon exhausted. Furthermore, ambiguity is always present but it is held in check by limitations on our ability to assimilate sense data and by the stored perceptual categories into which those data may be sorted. The structure of a system contains built-in constraints, imperatives that prevent an actor from behaving in an unlimited number of ways.[3] (The U.S. Weather Bureau sometimes has trou-

3. Daniel Bell, "Twelve Modes of Prediction—A Preliminary Sorting of Approaches in the Social Sciences," *Daedalus, 93* (1964), 845–80.

ble differentiating snow, freezing rain, sleet, and hail, but there are twenty-odd varieties of congealed moisture the Eskimo perceives.)

Law does not so much *prescribe* as *preempt*. It narrows the number of ways in which something can be done until, ideally, there are only two alternatives, which we think of as a choice between obeying or disobeying the law. We do not usually choose the nonlegal alternative, because it seldom appears to be an alternative. But let us assume that the urge to break the law impels us to consider alternatives: the other alternative is that society places a high cost upon the implementation of nonlegal course of action. (We disposed of the sanctions theory earlier and we will not resurrect it here.) If law is identified as the mobilization of physical sanctions, it becomes a mere adjunct to the study of social pathology and deals with deviant, hence minority, behavior, but understanding law as a limitation of alternatives converts it into a process that has a larger arena in which to operate. Nondeviants, who are assumed to have little or no contact with law, deal with law constantly. It is a vast oversimplification to think that law operates only against "bad men," who strive to avoid its vindictive clutches. Indeed, by "law-abiding citizen" we mean an individual to whom law is an ever-present factor in decisions. Law acts in a context of particular situations and it acts by systematically excluding alternatives. In the same way that a city street plan eliminates various alternatives for moving from one point to another, laws "provide the paths over which the affairs of that community are carried on, and there are no alternatives." [4]

Hart points out that the law does not compel a man to make a will; it says only that he will have a much better chance of having his wishes met after his death if he makes a will.[5] A landlord need not require a lease, nor need a prospective tenant request one, but both parties will enjoy a reasonably secure relationship if they utilize the tool the law provides. The fact that such examples parallel our common experience suggests the universality of law as the limitation or exclusion of alternatives, for no one would be surprised to find the same phenomena in stateless societies. Legal propositions and concepts, as it were, provide, paths of action through the past, present, and future. They are the cache of perceptual categories from which we structure decisional situations that have arisen, are arising, or may arise in the future. The way in which situations are

4. See Samuel M. Thompson, "The Authority of Law," *Ethics, 75* (1964), 16–24.

5. Hart, pp. 34–37.

structured crucially determines the available options. How many different ways can we describe a situation in which a family resides in a building that is owned by another? Unless we are unusually imaginative we will immediately cast the situation into familiar patterns: renting, leasing, visiting, and so on. The patterns also are legal concepts, as it happens, and for good reason: the concepts of law perform their first duty in telling us what is happening.

If mediation simply legitimates that which has occurred, what of the prospective, future-oriented thrust of the law? The forward thrust comes from what, in a broad sense, is the force of precedent. The perceptual dominance an earlier solution exerts over a present suggestion, the slow accretion of exceptions until they become so conspicuous that they form a new rule—these are the stuff of precedent. A legal system contains the evolving perceptual categories through which actors structure situations. It matters little that a conflict situation has been resolved by only an apparent legitimation of the existing distribution of power; the legitimation was accomplished by the use of concepts that were inherited from similar situations, and these concepts (perhaps slightly modified) will be passed on for future use in similar settings. The sheer existence and internalization of the concepts ensure that they will be a guiding force in determining how future decision-makers will use future alternatives. Beneath the surface of self-serving motives, every decision, looks to the past for guidance and every decision bequeaths something to the future, which either reinforces or undercuts some aspect of received norms.

Although the Anglo-American legal system is attuned to questions of precedent, other systems acknowledge the role of precedent under different names. Custom, first and foremost, is an anthropological term, and what has been difficult to examine in primitive societies has not been the power of tradition but the sources of change. In international law, custom has always been readily acknowledged.[6] Even the World Court, whose decisions are not binding in future cases, tacitly defers to its precedents. The weight of the past lies heavily on the judges, regardless of their personal attitudes toward it and despite the formal restriction on its applicability.[7]

Thus it is comparatively easy to see the explicit mediator as a Janus-figure, drawing on the past and contributing to the future as he repairs

6. Lauterpacht, ed., *Oppenheim's International Law, 2,* 68.
7. Ibid., p. 70.

damage to the social fabric in the present. What, then, is the relationship between implicit mediation and the structuring of situations? A legal system, by virtue of its place in cognitive processes, is inevitably bound up with the way in which choices are made, irrespective of societal complexity. But societal complexity is reflected in the complexity and ambiguity of legal concepts. The limited ambit of concepts for the functioning of implicit mediation suggests that these concepts communicate a very limited range of alternatives. Unless the suggested alternatives are ramified to produce confusion rather than order, implicit mediation can hold its place. It also is worth noting that implicit mediation involves predictions—attempts to foretell what an antagonist will do if he acts first and what he will do in response to action taken against him.

If anything, our picture has been rather one-sided, imbued with order, the predictability of behavior, and the patterning of social situations. Although we have kept justice at a distance, the pervasiveness of order seems too universal to be true. Before we finish, however, we will say a few things about the probable fate of order in a world that so often is deemed to be without it.

Information theory tells us that predictability is the same as sufficiency of information; order can be extended from the equation of prediction and information to the equation of prediction and rationality. In other words, if we can predict the behavior of others, they must be acting rationally. On the other hand, experience in societies at virtually all levels of complexity indicates great hazard in imputations of rationality. We know that orderly pattern of behavior occasionally break down and that new and different orderly patterns, in time, emerge from the wreckage; but the transitional period can be long and chaotic. Distinctions must be made, however, in degrees of order.

The prediction of which we have spoken is more inclusive than the implied prediction of the Holmesian "law is what the courts do." If the courts temporarily zigzag, all predictions are suspended. But the predictability to which we refer is very different and much more basic; it involves constraints that the actors may be totally unaware of. These constraints are limitations on the ability to conceive alternatives, so that what is predictable is the range of available alternatives in any situation rather than the specific alternative that is eventually chosen. For example, it can be "predicted" that a car traveling between two points within a city is lim-

ited to a determinate number of routes, but the route the driver actually chooses may depend upon factors that are external to the street grid.

We do not know all of the circumstances under which this kind of prediction becomes impossible because the natural tendency of social science to seek rationality wherever it can be found has made the investigation of random behavior somewhat unfashionable. Systematic investigation of what we intuitively see as orderly is always easier than looking for order where our senses and judgment have told us none exists. Radical disorder as an alternative to law crops up from time to time in two related guises, but we can only touch upon them here. The first guise is charismatic authority; the second is millennial movements. Both, on occasion, have coexisted and both, as terms, have been subject to the degenerative effects of indiscriminate usage.[8]

Rather than enter the semantic tangle we will adopt some definitions of art and let it go at that. The charismatic leader, perceived to have supernatural or at least extraordinary powers, stands as a religious or secular prophet in the eyes of his adoring disciples. Millennial movements often see themselves as destined to destroy the existing social order, root and branch, and to establish a new dispensation in fulfillment of a high imperative. The terms need not refer to explicitly political phenomena, despite their theological connotations, but in political contexts they have the peculiar characteristic that they reject law—not a particular law but law as law.

We have discussed the human craving for order, which, aside from the temporary sense of mission the charismatic leader and/or the millennial movement can provide, is provided by law. The literature about the movements (in which charismatic leaders frequently figure) is rich in description if not in theory,[9] and shows that the movements have a strong antinomian flavor, a feeling that everything is permitted and all means are validated by the movements' transcendent ends. When such phenomena break out of their other-worldly shells and go about reshaping the world, the whims of the leader have the force of law. Nazism, that strange mixture of the messianic and the bureaucratic, made its leader's whims the

8. Daniel Bell, "Sociodicy," *American Scholar, 35* (1966), 696–714.

9. See Anthony F. C. Wallace, "Revitalization Movements," *American Anthropologist, 3* (1956), 264–81; Sylvia Thrupp, ed., *Millennial Dreams in Action* (The Hague, Mouton, 1962); and Vittorio Lanternari, *The Religions of the Oppressed, A Study of Modern Messianic Cults* (New York, Mentor, 1965).

cardinal principle of its own brand of jurisprudence: the word of the Fuhrer had the force of law.

The chiliastic character of Nazism—and Communism—has made the study of such millennial movements a matter of contemporary concern. The belated growth of "socialist legality" in countries that once viewed law as an instrument of oppression perhaps indicates the long-run ineradicability of law, despite the shambles that can be made of it in the short run. The terrible energies that are released by totalitarian movements parallel the effects of millennial movements in tribal societies, which shatter "the tyranny of custom," and suddenly—as David Rousset remarked of the Nazis—make all things possible. [10] In colonial conditions they seem to grow as a response to oppression, although this is difficult to prove because we have virtually no data from precolonial nonliterate areas.

It is easy to accept law simply as a given, thereby reducing our task to more and more precise descriptions and categorizations. As we look deeper into the abyss of extreme social disorder, however, we see that there is an empirical alternative to law—not merely an alternative to American law or Soviet law but to law as such.

Our traditional legal theory, which tended to see all societies from a Western perspective, distinguished between "law" and "non-law," but we have seen the limited utility this distinction has had. "Law" turns out to be municipal law, although it may be decked out in new conceptual clothing; "non-law" is whatever fails to measure up to refined Western expectations.

Millennial movements signal the collapse of a legal system through the disintegration of its jural community. Without a consensual base—a social-perceptual infrastructure—no legal system is possible. Why, at some point, the perceptual categories that once were accepted are suddenly rejected has not yet been explained. The geneses of antilegal movements are matters of sheer speculation but it is clear that the division between law and non-law must be redefined, and in terms much more disturbing than Austin ever considered.

The physically remote habitats of many multicentric societies also make their immediate relevance seem remote. Such terms as "multicentric" and "unicentric," of course, represent ideal types that in reality are found only

10. Quoted in Arendt, *The Origins of Totalitarianism,* p. 303.

in the form of approximations and blends. We would not think of trying to fit the United States to the pattern of multicentricity, but perhaps we ought to try—not because we would suddenly find ourselves living in a tribe of continental scope (McLuhan to the contrary notwithstanding), but because the attempt might illuminate some features that our traditional categories of centralization have suppressed.

A state that has only recently been integrated may succeed in suppressing but not in eliminating separatist tendencies. The centralized formal structure of its legal system necessarily would mask rather than display the centripetal-centrifugal tension. Every federal system manifests the opposing pulls of the center and the periphery—pulls that a theory, if it were based solely upon state centralization, would have to deal with only as deviant cases. Even a rigorously hierarchical system approaches, but never attains, monolithic solidarity. If only for reasons of administrative rationality, it will be divided at its lowest levels into small, local jurisdictions, and—unless the society is of a hitherto unknown homogeneity—there will be value differences between these units. The Supreme Court's desegregation decisions have illuminated the potential tensions between the court and federal district courts in the South; therefore, the device of senatorial courtesy would be expected to produce district judiciaries that are reflective of district mores and, consequently, opposed to the Supreme Court, and this is precisely what has happened.[11]

The demise of the pluralistic philosophy has made us forget the fragmented character of American society. We may recognize an enclave of horizontal law in labor relations, but we also could have seen it throughout the neglected realm of private politics and private government. The relationships of producers in an oligopolistic market, of colleges within a university, of divisions within a corporation, of locals within a large union, of churches within a religious organization—all of these probably manifest both implicit and explicit mediation. The political scientist, who has forfeited most of these potential research fields to economics, sociology, and business administration, deprived himself of miniature societies that are as exotic as any in sub-Saharan Africa. The legal scholar has done little better, for his formal interest begins only when such organizations embroil themselves with the external municipal-law system. The practicing attorney, however, who must mediate factional disputes, has an

11. Sanford Levinson, "The Supreme Court: Does It Have an Innovative Role?" *Harvard Review, 3* (Fall-Winter 1965), 1–23.

accurate knowledge of horizontal private law in American society that has yet to be tapped.

It is a demonstrable fact that only a fraction of the legal cases that begin in the courts are ultimately disposed of through a trial. We do not yet have a clear picture of the courts as an arena for mediation, of the judges as mediators, or of trials as legitimators of decisions that already have been made through extrajudicial mediation. In other words, there would seem to be many unexplored areas of the court system within which elements of horizontal law operate frequently and effectively. Indeed, it may well be true that the formal apparatus would be hopelessly overburdened if it were not for these expedients.

It might also be said that just as segmentary lineage systems are rapidly receding into history, the stateless qualities of international relations are rapidly being displaced by centralizing tendencies, for the last quarter-century has witnessed a significant expansion in the number and activities of international organizations. It may well be that this growth is irreversible, so that the predominantly horizontal character of international law will one day be a thing of the past. Before we deliver so optimistic a verdict, however, three important qualifications must be entered.

First, the record of the social sciences in predicting short-term political trends has been neither long nor particularly successful, and it can be argued whether the practice should be continued.[12] The ability to discover general relationships among variables and project them into the future is much different from attempting to foretell the shape of political institutions over, say, the next five years. Of course, the latter type of prophecy is involved when we speculate upon the future of international organizations.

Second—and aside from epistemological problems—the record of international organizations thus far has not exhibited any trends toward irreversible task-expansion.[13] The record that lies behind us—in the Concert of Europe, the League of Nations, and the UN—indicates that organizational development frequently is linked to the goal of preserving an international status quo rather than directed toward the radical rearrangement

12. Michael Barkun, "Bringing the Insights of Behavioral Science to International Rules," *Western Reserve Law Review, 18* (July 1967), 1639–60.

13. Michael Barkun, "Integration, Organization, and Values," in Robert Gregg and Michael Barkun, eds., *Functions of the United Nations System* (Princeton, Van Nostrand, 1968).

of political power. Again, although it may well be that linkage to the status quo will one day be seen as only a transient episode, this linkage nevertheless engenders skepticism. If we impute great innovative power to international organizations and suggest the emergence of vertical norms, we must at the same time believe in a political revolution as far-reaching as that which accompanied the change from feudalism to the state system. The former, too, may come to pass, but evidence for this is fragmentary and ambiguous.

Third, the fragmentation of empires since the Second World War has multiplied rather than diminished the number of political actors. The strength of regional and global organizations must be measured against the proliferation of new states, and it is much too early to tell which is the stronger, or whether, in the end, the two tendencies will prove irreconcilable.

In other words, there are ample reasons for thinking that the basic structural configurations of international politics (outlined in Chapter 2) are relatively enduring. To confuse our desires for the future with what we have demonstrated in the present is a potentially dangerous matter because it gives rise to expectations for international law that cannot possibly be fulfilled.

There seems to be an inverse relationship between the existence of a profession and the development of pure scholarship in the substantive area. Thus there is writing and literary criticism, painting and art history and criticism, business and economics, but there is no discipline that studies the development, structure, and folkways of medicine, although attempts are being made by sociologists of medicine. ("Medical research" is instrumental in function, and much that goes under this term lies within cognate natural sciences, such as biochemistry.) A complementary field now appears to be emerging that parallels the legal profession. We can, with increasing clarity, discern not only the traditional professional orientation of law but the study of law as an important segment of human experience. Cross-disciplinary efforts in jurisprudence, political science, sociology, and anthropology indicate the emergence of an as yet nameless new field of inquiry.

This development raises the perennial problem of the relationship of observer to object. To the student of law who approaches the law as data rather than as vocation, all of the available theoretical orientations have

proved ambiguous. In principle, the legal profession, legal education, legal methodology, legal philosophy, and so on provide the grist for his mill, the data on which his analysis depends. In practice, these data pools have had an unintended feedback effect on the observer. What is observed has come to structure the observation itself, as if an economist used profit-and-loss statements as his primary tool of analysis.

The rapidity with which social scientists and lawyers have embarked on a joint enterprise means that the desire for a systematic study of legal phenomena has outpaced the means available for doing so. Perhaps from inadvertence, perhaps merely to fill a vacuum, the observer of law by and large has adopted the units, methods, and theory of the law and made them his own. In the act of observation, the necessary distance between observer and object has been telescoped and the observer has assimilated the features of the object he studies. Thus court cases and opinions, indisputable sources of data, have also become the units of analysis. Instead of being reclassified and recast into more useful analytic structures, they have been commandeered and studied "as is."

What from the beginning should have been the development of analytic structures became, instead, an increasing refinement of concrete structures. In method and in outlook the disinterested student of the law has virtually become the double of his object of study. Unless his purpose is to outlawyer the lawyer, the result is redundancy rather than new knowledge. What is useful to the lawyer may be of only marginal utility to one who stands outside the law. The difficulty that is encountered in studying non-Western, non-municipal legal systems is an outgrowth of this basic matter of viewpoint: it is impossible to organize segmentary lineage systems in terms of opinions, courts, judges, and police. It is technically possible to do this in international law, but the result would only compound confusion by remaking international law in the image of its alleged municipal counterpart.

The alternative, analytic point of view that we have taken discovers important peculiarities, if nothing else: law where there are no legal institutions and legal institutions that perform various legal functions but not necessarily the functions usually ascribed to them. These anomalies are similar to those that appear whenever common sense encounters an analytic framework. But the purpose of analysis is to wrench the world from its accustomed moorings and reassemble it so that we can learn things about it that we could not otherwise know. All such frameworks affront

the conventional wisdom of the senses, even if—in the end—the senses are the true validators of analysis. Analytic structures disclose the limited usefulness of common sense although, as in physics, we learn to view the limitation with forebearance.

Law has for too long been anchored in common sense. Whatever advantages this has had for society (and they have been great), the advantages have not been of comparable magnitude for the social scientist. What makes sense in the milieu of the legal profession can scarcely be expected to make similar sense in the very different milieu of the social sciences. Each profession seeks ends that are too different to permit free and easy borrowings.

This study has sought the roots of ordered behavior in areas in which, if our traditional wisdom had been followed, they ought not have grown. It has sought order among primitive societies (long given over, in the popular imagination, to all manner of random violence) and in the international arena (oscillating between excessive expectations and excessive cynicism). The concept of law that has emerged is at once more unitary and more varied than traditional theories permit. It is unitary because segmentary lineage systems and international relations have been placed within the pale of law. A corollary of this is that the state has been denied its customary honored place as the guardian and sine qua non of the legal order. The concept is varied because the constants of law can be accommodated by a wide range of societies that, at the same time, add a bewildering but as yet uncategorized array of modifiers, accessories, and supplements.

Whether under the guise of conformity or consensus, the human animal has a drive toward order and a corresponding aversion to randomization that operate throughout the broad spectrum of his collective life; and law, far from being of importance only to the disobedient few, is a primary device for ordering the lives of the conforming many. For most of us, change above a minuscule level is an unpleasant experience, even when we bow before the desirability of its fruits or the inevitability of its coming. Law provides a means for maintaining change within humanly acceptable limits, for allowing innovation by increments while keeping the general scheme of things within accustomed tracks—for perpetually altering the status quo while perpetually preserving it.

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